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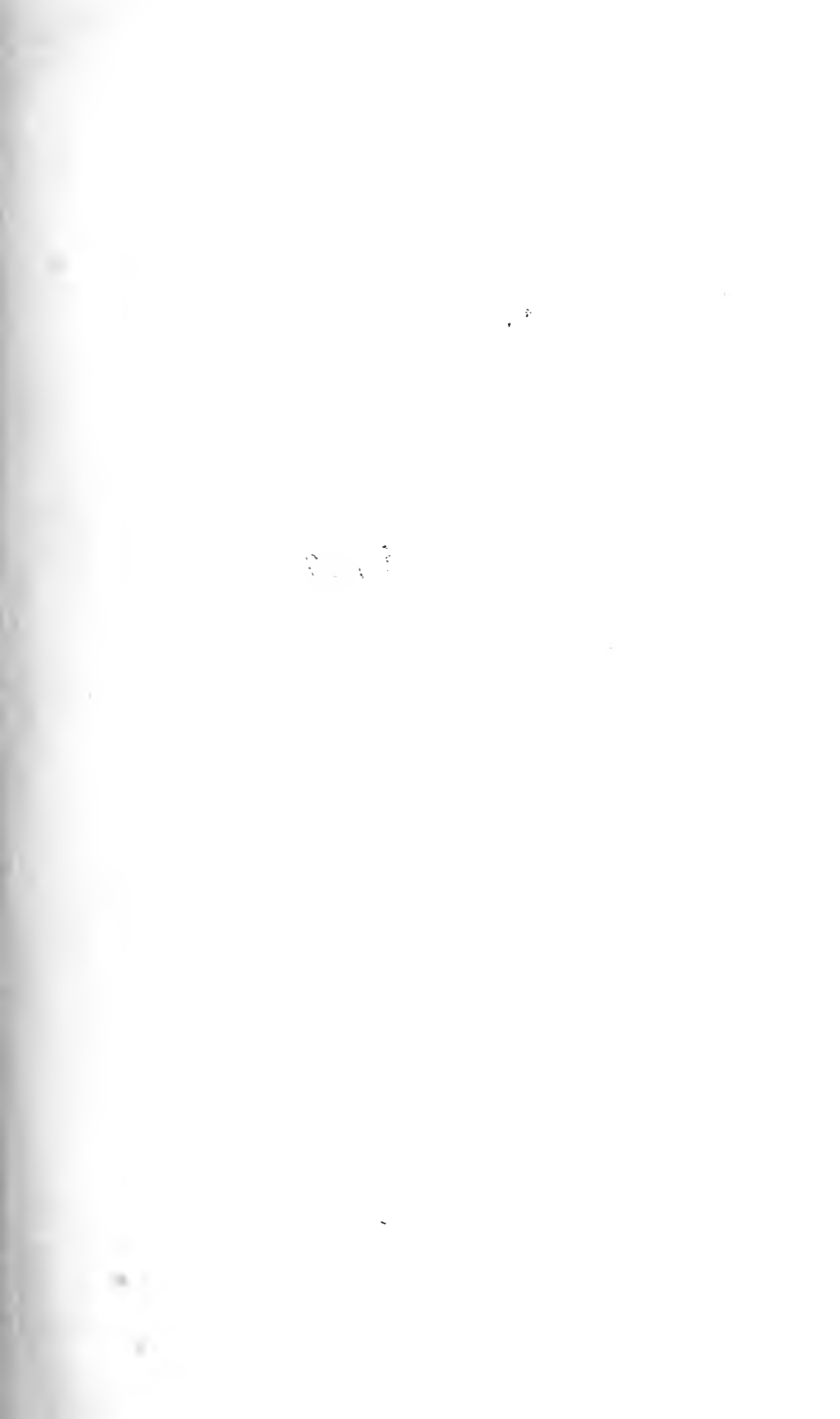
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v. 2896

No. 14424

**United States
Court of Appeals**
for the Ninth Circuit.

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

Transcript of Record

**Appeal from the United States District Court
for the District of Alaska,
Fourth Division**

FILED

DEC 24 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

WARREN A. TAYLOR,
EUGENE V. MILLER,

Box 200,
Fairbanks, Alaska;

BELL & SANDERS,
Box 1599,
Anchorage, Alaska,

Attorneys for Defendants and Appellants.

COLLINS & CLASBY,
WALTER SCZUDLO,

1000 Polaris Bldg.,
Fairbanks, Alaska;

JOSEPH DIAMOND,
EARLE ZINN,

HERMAN HOWE,
Eighth Floor, Hoge Bldg.,
Seattle 4, Washington,

Attorneys for Plaintiffs and Appellees.

In the District Court for the Territory of Alaska,
Fourth Division

No. 7298

FAIRVIEW DEVELOPMENT, INC., an Alaska Corporation; NELSE MORTENSEN, CLIFF MORTENSEN and FRANK V. HENDERSON, Individually and as Directors and Stockholders of Fairview Development, Inc., and for and on Behalf of All Other Stockholders of Fairview Development, Inc.,

Plaintiffs,

vs.

CASH COLE, Individually and as an Officer and Director of Bayview Realty, Inc., an Alaska Corporation, and Fairview Development, Inc.; EVERETT NOWELL, Individually and as an Officer and Director of Bayview Realty, Inc., and Fairview Development, Inc.; BAYVIEW REALTY, INC., an Alaska Corporation; FIRST NATIONAL BANK OF FAIRBANKS, a Corporation, and BANK OF FAIRBANKS, a Corporation,

Defendants.

COMPLAINT

Come Now the plaintiffs and for cause of action against the defendants complain and allege as follows:

I.

That the plaintiff Fairview Development, Inc.,

is a corporation duly organized and existing under and by virtue of the Laws of the Territory of Alaska, and has paid its annual corporation tax last due, and has filed its annual report for the last calendar year.

II.

That the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson are stockholders of the plaintiff Fairview Development, Inc., each of said plaintiffs owning 150 shares of the common capital stock of said Fairview Development, Inc., and collectively owning 50% of the common capital stock of said corporation. Said 450 shares of said capital stock also represent 50% of the voting stock of said corporation. The plaintiff Cliff Mortensen is a director and officer of said plaintiff corporation. This action is brought on behalf of said plaintiffs and all other stockholders of said Fairview Development, Inc., and for their benefit.

III.

That the defendants Cash Cole and Everett Nowell are officers and directors of Fairview Development, Inc., the plaintiff corporation, and are officers, directors and stockholders of Bayview Realty, Inc., the defendant corporation.

IV.

That said Bayview Realty, Inc., is an Alaska corporation organized and existing under the laws of the Territory of Alaska with its principal place of business at Fairbanks, Alaska. Said defendant

Bayview Realty, Inc., is the owner of 50% of the capital common stock of the plaintiff Fairview Development, Inc., comprising 450 shares of said capital stock, which also represents 50% of the voting stock of said corporation. The defendants Cash Cole and Everett Nowell control said defendant Bayview Realty, Inc.

V.

That the defendant First National Bank of Fairbanks is a national banking corporation, organized and existing under the laws of the United States, conducting a general banking business in the Territory of Alaska, having its principal place of business at Fairbanks, Alaska, within the jurisdiction of this court.

VI.

That the defendant Bank of Fairbanks is a banking corporation, organized and existing under the laws of the Territory of Alaska, conducting a general banking business in the Territory of Alaska, having its principal place of business at Fairbanks, Alaska, within the jurisdiction of this court.

VII.

That the plaintiff Fairview Development, Inc., was organized for the purpose of obtaining a Federal Housing Administration insured loan to provide funds for the construction of a large apartment housing project in Fairbanks, Alaska. Said plaintiff corporation obtained an insured mortgage loan for the construction of an apartment housing project

now known as Fairview Manor, situated in Fairbanks, Alaska, upon lands leased by the plaintiff corporation from the City of Fairbanks for a term of 75 years, and did construct said housing project.

VIII.

That as the apartment units were completed in said housing project, and ready for occupancy, the defendants Cash Cole and Everett Nowell, acting individually or as officers, directors and stockholders of Bayview Realty, Inc., or both, and on their own behalf, or on behalf of said Bayview Realty, Inc., did wrongfully usurp and take unto themselves, without any authority, possession of the premises and the control of said apartment housing project, collecting the rentals therefrom, controlling the project and disbursing the rentals at will and without accounting to the plaintiffs Fairview Development, Inc., Cliff Mortensen, Nelse Mortensen or Frank V. Henderson, all without any right or authority whatsoever.

IX.

That since taking over the operation of said apartment housing project, the said defendants Cash Cole and Everett Nowell, acting for themselves or Bayview Realty, Inc., or both, have without right or authority paid themselves from the rentals and funds belonging to the plaintiff Fairview Development, Inc., salaries and expenses never approved or authorized by the plaintiff Fairview Development, Inc., or the board of directors of said plaintiff Fairview Development, Inc., and without

the authority and approval of the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson. Said salaries and withdrawals have been exorbitant, beyond all proportion to services rendered and without lawful authority or legal right. In addition thereto said defendants Cash Cole and Everett Nowell have occupied apartments in said project rent free likewise without any authority or approval of the plaintiff Fairview Development, Inc., or its board of directors, or of any of the plaintiffs. Said defendants Cash Cole and Everett Nowell have further and without any legal right or legal authority paid to themselves from the funds of the plaintiff Fairview Development, Inc., large expenses and costs of living for themselves and their families while sojourning beyond the limits of the City of Fairbanks, and not in the furtherance of any interest or business of the plaintiff Fairview Development, Inc., or said Fairview Manor project. Said defendants have wholly failed and refused to account for and to pay to the plaintiff Fairview Development, Inc., the funds received by them from rentals and other income from said project. Said defendants have failed: To account for the funds belonging to the plaintiff corporation to the board of directors of said corporation; or to obtain the approval of said board of directors or of the stockholders for the withdrawal of funds for their own benefit or for the payment to themselves of exorbitant salaries and expenses; or to have said board or stockholders fix any salaries, or approve their

free rentals, or appoint them as agents, or authorize special or extraordinary disbursements or expenses or costs, or determine corporate policies, or exercise corporate powers, to the detriment, loss and damage of plaintiff Fairview Development, Inc., and the individual plaintiffs as stockholders of said corporation.

X.

That the defendants Cash Cole and Everett Nowell, acting for and on their own behalf or for and on behalf of Bayview Realty, Inc., or both, have by numerous acts and deeds, taken unto themselves, without right or authority, the operation, management and direction of the property of the plaintiff Fairview Development, Inc., a corporation, or the determination of corporate policies, or exercise of corporate powers, to the detriment, loss and damage of the plaintiff Fairview Development, Inc., and the individual plaintiffs as stockholders of said corporation and contrary to the General Laws of the Territory of Alaska, or the Articles of Incorporation or the Bylaws of said plaintiff corporation.

XI.

That on June 16, 1950, an agreement was entered into by and between the defendants Cash Cole, Everett Nowell and Bayview Realty Inc., as parties of the first part, and the plaintiff Cliff Mortensen, as party of the second part, a copy of which agreement is in the possession of the defendants, providing that the plaintiff Cliff Mortensen should have one vote as a director of said Fairview Develop-

ment, Inc., and that the defendants Cash Cole and Everett Nowell together should have one vote as a director of the plaintiff Fairview Development, Inc., and further providing that any action requiring the vote or approval of Fairview Development, Inc., must be unanimously agreed to by said plaintiff Cliff Mortensen on the one hand and said defendants Cash Cole and Everett Nowell on the other hand, and that no action taken by the board of directors of Fairview Development, Inc., without such unanimous approval would be binding, nor would such action be the act of Fairview Development, Inc., without such unanimous approval. Said contract further provided that in the event an agreement could not be had by the plaintiff Cliff Mortensen as a director on one hand and the defendants Cash Cole and Everett Nowell together as directors on the other hand, that such matter shall be submitted to Ken Kadow, of Juneau, Alaska, for decision, and his decision would be controlling and binding and the action to be taken by the plaintiff corporation; and in the event said Ken Kadow was not available, then said matter should be submitted to Roy Sumpter, whose determination shall be the action of the plaintiff corporation.

XII.

That the defendants Cash Cole and Everett Nowell in violation of said agreement have attempted to act for and on behalf of the plaintiff corporation without any authority or right whatsoever, and have disbursed and paid funds in sub-

stantial amounts belonging to the plaintiff corporation to themselves as aforesaid without the approval of the board of directors, or of the stockholders of the plaintiff corporation. Said defendants have failed and refused to submit matters which could not be settled by the board of directors of plaintiff corporation to Ken Kadow, but have entirely ignored the board of directors and the stockholders of said corporation. Said defendants Cash Cole and Everett Nowell have usurped the authority and powers of the plaintiff corporation, and have failed and neglected to call or hold any annual meeting of the stockholders as required by the Bylaws of the corporation.

XIII.

That the defendant First National Bank of Fairbanks has on deposit funds of Fairview Development, Inc., which will be dissipated and expended without authority, or for the personal use and benefit of the defendants Cash Cole and Everett Nowell without the authority of the board of directors, or the stockholders of Fairview Development, Inc., and said monies will be used for other than corporate purposes, all to the damage of the plaintiff Fairview Development, Inc., and the stockholders of said plaintiff corporation unless said defendant bank is restrained and enjoined from disbursing said funds upon the orders or direction of the defendants Cash Cole, or Everett Nowell, or Bayview Realty, Inc., or any of them acting alone or in concert.

XIV.

That the defendant Bank of Fairbanks has on deposit funds of Fairview Development, Inc., which will be dissipated and expended without authority, or for the personal use and benefit of the defendants Cash Cole and Everett Nowell without the authority of the board of directors, or the stockholders of Fairview Development, Inc., and said monies will be used for other than corporate purposes, all to the damage of the plaintiff Fairview Development, Inc., and the stockholders of said plaintiff corporation unless said defendant bank is restrained and enjoined from disbursing said funds upon the orders or direction of the defendants Cash Cole, or Everett Nowell, or Bayview Realty, Inc., or any of them acting alone or in concert.

XV.

That although the plaintiff Fairview Development, Inc., is fully solvent, a deadlock exists on the board of directors of said corporation and among the stockholders of said corporation on matters vitally affecting the welfare and best interests of said corporation; that the officers and directors of said plaintiff corporation are unable to agree upon matters affecting the life or affairs of said corporation; that the common stock ownership is evenly divided between opposing factions and an impasse exists between such factions both on the board of directors thereof and among the stockholders thereof. No decision or action can be taken or had by the plaintiff Fairview Development, Inc.,

for the protection of its assets and property for the benefit of all stockholders by reason of said deadlock.

That the defendants Everett Nowell and Cash Cole called a special meeting of the board of directors of the plaintiff corporation for October 29, 1952, at the office of said Fairview Development, Inc., in Fairbanks, Alaska; that the plaintiff Cliff Mortensen made a special trip from Seattle to Fairbanks, Alaska, to attend said special meeting of the directors; that at the meeting of the directors the defendants Everett Nowell and Cash Cole refused to permit any record or minutes of the meeting to be kept or taken and refused to permit the plaintiff Cliff Mortensen to make any motions or act upon any motions or matters concerning the corporation; that the plaintiff Cliff Mortensen made a number of motions which said defendants refused to consider or act upon. In spite of said deadlock they nevertheless refused to submit such matters to Ken Kadow or Roy Sumpter as provided in the agreement hereinbefore mentioned in section XI hereof. Moreover the defendant Cash Cole became very abusive and walked out of the meeting and insisted that the defendant Everett Nowell leave the meeting and the defendant Everett Nowell did so in order to prevent any matters or business being conducted by the directors for the corporation. The actions of the defendants Cash Cole and Everett Nowell were such as to prevent any future or further meetings of the directors for the transac-

tion of any business on behalf of the plaintiff corporation, as any such further meetings could only result in the same abusive action and refusal to consider any matters except those that the defendants Cash Cole or Everett Nowell might be interested in at the moment.

That the property and assets of the plaintiff corporation are presently being dissipated and lost by reason of said deadlock on said board of directors and among the stockholders; that irreparable injury and damage will be done to the plaintiff Fairview Development, Inc., and the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, and all stockholders of the plaintiff corporation unless this court intervenes for their protection; that there exists no plain, speedy and adequate remedy at law.

Wherefore, the plaintiffs pray for judgment and decree of this court as follows:

1. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, be required to render a full and complete accounting of all funds received by them, or any of them, belonging to and the property of the plaintiff Fairview Development, Inc., together with a full accounting of all disbursements made by them, or any of them, from funds of the plaintiff corporation, or purportedly on behalf of said plaintiff corporation, and that said defendants be further required to account for the reasonable rental value

of any apartments belonging to the plaintiff corporation and occupied by said defendants, and upon said accounting that the plaintiff corporation have judgment against the defendants for amounts found due, together with legal interest thereon.

2. That the court issue a temporary restraining order temporarily restraining and enjoining said defendants Cash Cole and Everett Nowell and Bayview Realty, Inc., or any of them, from receiving, or collecting, or disbursing any funds of the plaintiff Fairview Development, Inc., and requiring said defendants to vacate any apartments occupied by them belonging to the plaintiff corporation, and for which they have failed to pay any rentals.

3. That the court issue a temporary restraining order temporarily restraining and enjoining the defendants First National Bank of Fairbanks, and Bank of Fairbanks from disbursing any funds presently on deposit with said defendants, or either of them, and belonging to the plaintiff corporation, or standing in the name of the plaintiff corporation, or hereafter received in the name of the plaintiff corporation, except upon checks signed in accordance with such order as the court may enter herein.

4. That the court issue an order pendente lite appointing a disinterested party to take over the management and operation of said Fairview Manor apartments at Fairbanks, Alaska, collect all income therefrom and make all disbursements for current

operating expenses, payments on the mortgage indebtedness, or otherwise, and account therefor to this court.

5. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, be forthwith removed and disassociated from all management or operation, or any aspects thereof, of Fairview Manor apartments, or any other matter relating to said project, or to the affairs of said corporation.

6. That the plaintiffs have such other and further relief as to the court may seem just and equitable in the premises, together with the plaintiffs' costs and disbursements herein to be taxed, including reasonable attorneys' fees incurred in this behalf.

COLLINS & CLASBY,

By /s/ WALTER SCZUDLO,

Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed October 31, 1952.

[Title of District Court and Cause.]

ANSWER

Come now Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaska Corporation and Fairview Development, Inc.; Everett Nowell, individually and as an officer and direc-

tor of Bayview Realty, Inc., and Fairview Development, Inc.; Bayview Realty, Inc., an Alaska corporation, and answer to the complaint on file herein admit, deny and allege as follows:

I.

Answering paragraph I of the Complaint on file herein these answering defendants admit the allegations contained therein.

II.

Answering paragraph II of the Complaint on file herein these answering defendants deny each allegation therein contained.

III.

Answering paragraph III of the complaint on file herein these answering defendants admit the allegations therein contained.

IV.

Answering paragraph IV of the complaint on file herein these answering defendants admit that the said Bayview Realty, Inc., is an Alaska corporation, organized and existing under the laws of the Territory of Alaska with its principal place of business at Fairbanks, Alaska. Said defendants, Bayview Realty, Inc., is the owner of at least 50% of the capital common stock of the plaintiff, Fairview Development, Inc., comprising at least 450 shares of said capital stock which also represents at least 50% of the voting stock of said corporation. These answering defendants further admit that Cash Cole

and Everett Nowell control the Defendant, Bayview Realty Co., Inc.

V.

Answering Paragraph V of the Complaint on file herein these answering defendants admit the same.

VI.

Answering paragraph VI of the Complaint on file herein these answering defendants admit the same.

VII.

Answering paragraph VII of the Complaint on file herein these answering defendants admit that the plaintiff, Fairview Development, Inc., was organized for the purpose, among other purposes of constructing an apartment housing project at Fairbanks, Alaska, upon land leased from the City of Fairbanks, which said land was originally leased by Bayview Realty Co., Inc., from the said City of Fairbanks, Alaska, for a period of 75 years; that plaintiff, Fairview Development, Inc., did obtain a loan from the National Bank of Commerce, a national Banking corporation organized and existing under the laws of the United States, located in the City of Seattle, Washington; that the plaintiff Fairview Development, Inc., did enter into a contract with Nelse Mortensen, Alaska, Inc., an Alaska corporation for the construction of said housing project, and that the said Nelse Mortensen, Alaska, Inc., did enter upon the construction of said housing project. These answering defendants deny each and every other allegation therein contained.

VIII.

Answering paragraph VIII of complaint on file herein there answering defendants admit that as apartment units were ready for occupancy that Cash Cole and Everett Nowell acting pursuant to the terms of agreements previously made between plaintiffs and these answering defendants and with the knowledge, consent and approval of the plaintiff did manage and operate and are managing and operating said units and housing project on behalf of Fairview Development, Inc., these answering defendants deny each and every other allegations therein contained.

IX.

Answering paragraph IX of complaint on file herein these answering defendants admit that they have conducted the management and operation of said units and housing project pursuant to the agreements heretofore referred to all with the knowledge, approval and consent of the plaintiffs. These answering defendants further admit that they have accounted to plaintiff and all other necessary parties in accordance with the agreements heretofore referred to and with the knowledge, consent and approval of plaintiff and in this regard have retained Herbert Lofquist, an accountant, to conduct the bookkeeping and accounting of said operation and management, all pursuant to the agreements heretofore referred to and with the consent, approval and knowledge of plaintiffs; these answering defendants deny each and every other allegation therein contained.

X.

Answering paragraph X of the complaint on file herein these answering defendants deny each, every and all allegations therein contained.

XI.

Answering paragraph XI of the complaint on file herein these defendants admit that an agreement was entered into by and between Cash Cole and Everett Nowell and Bayview Realty, Inc., as parties of the first part and Cliff Mortensen as party of the second part on June 16, 1950. These answering defendants deny each and every other allegation therein contained.

XII.

Answering paragraph XII of the complaint on file herein these answering defendants deny each and every and all allegations therein contained.

XIII.

Answering paragraph XIII of the complaint on file herein these answering defendants admit that the defendant, First National Bank of Fairbanks, has on deposit, funds of Fairview Development, Inc., these answering defendants deny each and every other allegation therein contained.

XIV.

Answering paragraph XIV of the complaint on file herein these answering defendants admit that the defendant, Bank of Fairbanks, has on deposit funds of Fairview Development, Inc., these answer-

ing defendants deny each and every other allegation therein contained.

XV.

Answering paragraph XV of the complaint on file herein these answering defendants admit that Everett Nowell called a special meeting of the Board of Directors of the plaintiff corporation for October 29, 1952, at the office of said Fairview Development, Inc., in Fairbanks, Alaska; and these answering defendants further admit that Cliff Mortensen attended said special meeting. These answering defendants deny each and every other allegation therein contained.

Wherefore, these answering defendants having fully answered the complaint of the plaintiffs, pray for a decree of this court as follows:

1. That the complaint on file herein be dismissed with prejudice.
2. That these answering defendants have their costs and disbursements expended, including reasonable fees incurred in their behalf.

MORRISSEY, HEDRICK,

ROBERTS & DUNHAM,
Attorneys for Answering
Defendants.

Duly verified.

[Endorsed]: Filed December 17, 1952.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR APPOINTMENT OF RECEIVER AND TEMPORARY INJUNCTION

State of Washington,
County of King—ss.

The undersigned, Cash Cole, being first duly sworn on oath deposes and says:

1. That he is a citizen of the United States and of the Territory of Alaska; that he is over the age of twenty-one years and sui juris.

2. That he is one of the defendants in the above-entitled cause; that the above-named action is brought by Nelse Mortensen, Cliff Mortensen and Frank V. Henderson; that insofar as Fairview Development, Inc., an Alaska corporation, is concerned, no authority or official action of said corporation has been taken by said corporation officers to bring this law suit; that in plaintiff's complaint and affidavit it is alleged that such action was brought on behalf of the named individual plaintiffs and all other stockholders of Fairview Development, Inc., the facts being, however, that there is no common stock of Fairview Development, Inc., owned by anyone other than the three named plaintiffs herein and Cole, Nowell and Bayview, Inc.; that there is issued one hundred shares of preferred stock of the value of \$1.00 per share which have been issued to the Federal Housing Administration, Agency of the United States Government, but that these plaintiffs

nor their attorneys have no power or authority to bring any suit for the United States Government or any other agencies in this matter.

3. That Fairview Development, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska with its principal place of business in Fairbanks, Alaska; that the said corporation is the owner of a leasehold of real estate in the Territory of Alaska which leasehold is improved by an apartment building.

4. That Nelse Mortensen, Alaska, Inc., was a corporation organized and existing under and by virtue of the law of the State of Washington with its principal place of business in Seattle, King County, Washington; that Nelse Mortensen, Alaska, Inc., was dissolved by the individual plaintiffs herein, namely Nelse Mortensen, Cliff N. Mortensen and Frank V. Henderson; that the named individuals were all of the directors and shareholders thereof; that possession and control of all the assets of the corporation was taken by the said individuals; that all the liabilities of the corporation were assumed by them and that these individuals hold the assets of the corporation as Trustees for the corporation and as Trustees are obligated for the liabilities for the corporation; that the said individuals, namely Nelse Mortensen, Cliff N. Mortensen and Frank V. Henderson are co-partners doing business as Nelse Mortensen Alaska Company.

5. That on or about July 10, 1950, Fairview Development, Inc., as owner, entered into a written

construction contract with Nelse Mortensen, Alaska, Inc., a corporation, for the construction of a multiple housing or apartment building on the leasehold estate owned by Fairview Development, Inc. Said building was to be known as Fairview Manor Apartments and Fairview Development, Inc., agreed to pay Nelse Mortensen, Alaska, Inc., an agreed price of \$3,080,000.00 for said construction; that thereafter the individual plaintiffs, namely, Nelse Mortensen, Cliff N. Mortensen and Frank V. Henderson, acting as Trustees of Nelse Mortensen, Alaska, Inc., and as co-partners, doing business as Nelse Mortensen Alaska Company undertook to perform the obligations of the contract, assumed all the liabilities of the contract and then performed certain work in the construction of the building to be constructed pursuant to the terms of the contract and obtained from Fairview Development, Inc., all of the \$3,080,000.00.

6. That the defendant, Everett Nowell, is the regularly and duly elected and acting President of Fairview Development, Inc.; that the defendant, Cash Cole, is the regularly and duly elected and acting Secretary-Treasurer of Fairview Development, Inc.; that both Cash Cole and Everett Nowell are duly and regularly elected and acting Directors of Fairview Development, Inc.; that the minutes and records of Fairview Development, Inc., substantiate that statement.

7. That the Board of Directors of Fairview Development, Inc., consists of three members only, the

third member besides Cash Cole and Everett Nowell being Cliff Mortensen.

8. That Bayview Realty, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska; that Cash Cole and Everett Nowell own all of the stock of Bayview Realty, Inc.; that they constitute the Board of Directors of said corporation; that they are the officers of said corporation and control said corporation.

9. That on the 15th day of June, 1950, a contract and agreement was entered into by and between Bayview Realty, Inc., an Alaska corporation, Cash Cole and Everett Nowell as parties of the First Part, and Nelse Mortensen, Cliff Mortensen and Frank V. Henderson as parties of the Second Part wherein among other things it was agreed as follows:

Upon the completion of the construction of said housing project at Fairbanks, Alaska, Bayview Realty, Inc., shall have the management and operation of the building and the completed project on behalf of Fairview Development, Inc.

10. That on the 3rd day of August, 1951, at 10:00 o'clock in the forenoon of said day, a special meeting of the Board of Directors of Fairview Development, Inc., was regularly and duly called upon notice, by its President, Everett Nowell; that all of the Directors of Fairview Development, Inc., were present,

namely Everett Nowell, Cash Cole and Cliff Mortensen; that the purpose of said meeting was to effectuate the management contract and understanding of the parties and enter into a contract for the management of the apartment house; that at said meeting, a proper resolution was passed which provided that a contract should be executed by and between Fairview Development, Inc., and Bayview Realty, Inc., whereby Bayview Realty, Inc., would assume the management of Fairview Development, Inc., in that apartments were then becoming available for occupancy, and that Fairview Development, Inc., was to pay Bayview Realty, Inc., a fee of five per cent (5%) of the total income of Fairview Development, Inc., with a minimum guarantee of not less than \$2,000.00 per month, plus all expenses incurred by the Bayview Realty, Inc. It was further decided in said resolution that the sole owners of Bayview Realty, Inc., were Cash Cole and Everett Nowell, and that in the event that Cash Cole and Everett Nowell decided to dissolve Bayview Realty, Inc., as a corporation and operate Bayview Realty, Inc., as individuals, that in such case, the provisions of the contract would apply to Everett Nowell and Cash Cole; that thereafter on the 1st day of December, 1951, an agreement was executed by and between Bayview Realty, Inc., and Fairview Development, Inc., embodying the terms of said resolution.

11. That at all times Cash Cole and Everett Nowell, or either of them, acting as officers and Directors of Fairview Development, Inc., and as

officers and directors of Bayview Realty, Inc., and as individuals, have used their best efforts and energy in managing the housing development known as Fairview Development, Inc.; that it was necessary for Everett Nowell and Cash Cole, as President and Secretary-Treasurer, respectively, of Fairview Development, Inc., to manage said project and if they had not managed said project, Fairview Development, Inc., would now be insolvent, the housing project would be unfit for occupancy and the property and assets of Fairview Development, Inc., would be owned and controlled by the mortgage lender.

12. That Cash Cole and Everett Nowell have been managing the apartment, collecting the rentals, and disbursing the rentals all with the best interest of the project and the corporation in mind.

13. That Fairview Development, Inc., by and through the action of all of its Directors retained the firm of Pritchard and Lofquist, Certified Public Accountants, 1711 Exchange Building, Seattle 4, Washington; that Mr. Herbert Lofquist of said firm and who is a Certified Public Accountant himself set up a system of books when the housing project was first opened for occupancy; he was instructed to institute and did institute a plan of accounting and a system of receiving and disbursing the money. The accounting system set up by Mr. Lofquist has been followed consistently since its institution and is still being maintained at the office of Fairview Development, Inc., at Fairbanks,

Alaska. The books at all times and now are open for inspection to any person qualified to look at them including the Directors and Stockholders of the corporation; Mr. Lofquist made regular inspection of the books and accounts up to January 1, 1953; he made a quarterly report which was issued to all stockholders; Mr. Lofquist was retained by Fairview Development, Inc. On January 1, 1953, Fairview Development, Inc., lost one hundred tenants at one time, due to Army regulations and conditions beyond the control of the management of Fairview Development, Inc. This loss created a drastic situation which resulted in drastic economies so the services of Mr. Lofquist were dispensed with; however, at all times since the opening of the project, these books have been kept by a bookkeeper, Mrs. Arnoldine Scott, a woman chosen and hired by accountant Lofquist. She at all times has been under bond and is still an employee of Fairview Development, Inc. She is in charge of all collections and bank deposits and makes out vouchers for expenditures. That the statement that these defendants have controlled the project and disbursed rentals at will and without accounting to plaintiffs or any one or more of them is false and without any basis whatsoever.

14. Cash Cole and Everett Nowell since the project has been opened have spent time managing said project and protecting the property. For such work they have received a salary; this is justified due to the fact that they are President and Secretary-

Treasurer of the corporation, Directors of the corporation, plus the fact that such payments are justified by the action of the Board of Directors of August 3, 1951. Everett Nowell received a salary from the time the said project opened for occupancy up until January 1, 1953; at that time drastic economies were necessary so Everett Nowell took himself off the payroll; up to that time, he spent much time in the management of the project. No expenses have been paid by Fairview Development, Inc., to Everett Nowell or Cash Cole for themselves and their families while sojourning beyond the limits of the city of Fairbanks except for actual traveling expenses of the two individuals themselves and their actual expenses while out of the City of Fairbanks, transacting business for Fairview Development, Inc. Any charge that expenses have been charged to Fairview Development, Inc., for living for themselves and their families while away from Fairbanks, Alaska, is false, untrue and without basis.

15. That Cash Cole and Everett Nowell have occupied apartments in said housing project; that said occupancy is necessary for the proper management and protection of said property; that Everett Nowell as President and Cash Cole as Secretary-Treasurer have called numerous Directors meetings of the Directors of Fairview Development, Inc., for the proper conduct of the affairs of said corporation; they have always kept proper minutes of said meet-

ings and that in substantiation of this the Minute Book of said corporation will show such to be true.

16. That the individual plaintiffs herein, namely Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have, as stated above, individually assumed the liabilities and responsibilities of that certain contract for the construction of the project. That the said three individuals refused and neglected to pay during the construction work on said housing project, although required to do so by the contract herein referred to, interest on the mortgage due January 1, 1952, in the amount of \$9,075.26 and thirty days delinquent interest in the amount of \$30.25 and interest on mortgage due February 1, 1952, in the amount of \$9,194.00; they further refused and neglected to pay real estate taxes levied August 1, 1951, in the sum of \$31,612.00 and that due to such neglect and failure and refusal of those three individuals to make the required payments, these defendants as officers, directors and managers of Fairview Development, Inc., were required to make such payments from the assets of Fairview Development, Inc.

17. That the said three plaintiffs individually in their respective capacities have failed and neglected to complete the construction of Fairview Manor Apartment project according to the terms and provisions of the contract; that because of such failure to complete and properly construct said project and because of their failure to pay the sums of money above, it has been necessary for Fairview Develop-

ment, Inc., to bring suit against the three individuals named herein and their wives and their respective marital communities to recover the sum of \$699,912.27; that said suit is presently on file in the District Court of the United States for the Western District of Washington, Northern Division.

18. That in spite of the inadequacies of the construction by the plaintiffs herein individually and further in spite of the fact that they have received the entire \$3,080,000.00 for the construction of the project and have failed to pay substantial sums of money required by them to be paid, the management of this project has been carried on in a remarkably efficient and proper manner; in substantiation of this attached hereto is a copy of a letter directed to Fairview Development, Inc., and by this reference made a part hereof. This letter is from J. C. Campbell, Vice-President and Manager, Mortgage Loan Department, Seattle Trust and Savings Bank, who is servicing the underlying mortgage on the project for Institutional Securities Corporation of New York. One paragraph of the attached letter should be emphasized as follows:

“First I want to compliment you on the work that has been to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face, one can-

not help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project."

19. That plaintiffs allege in their complaint on file herein that defendants, Everett Nowell and Cash Cole, call a special meeting of the Board of Directors of Fairview Development, Inc., on October 29, 1952, in Fairbanks, Alaska; that plaintiff Cliff Mortensen was present and that Nowell and Cole refused to permit any records or minutes to be kept or taken and further refused to allow Cliff Mortensen to make any motions or act upon any motions or matters concerning the corporation and further refused to submit the matter to Ken Kadow and Roy Sumptor. The true facts of the situation are as follows: Everett Nowell as President of the Corporation sent out notice to the directors of the corporation that a special meeting for the specific purpose of discussing the feasibility of construction of an additional light plant, as the corporation was confronted with problems coming up that winter with reference to the light and electricity. Cliff Mortensen voted "No" upon the proposed proposition; Cash Cole and Everett Nowell voted "Yes." After the matter was discussed, which was the only matter to be discussed in the special meeting, the said meeting was adjourned. **Minutes were taken** and duly written up and signed by the President and Secretary-Treasurer of the corporation and are part of the records of the corporation. The only

reference to Ken Kadow or Roy Sumptor during the meeting was the fact that Cliff Mortensen suggested that the matter should be referred to one of these gentlemen. Cash Cole and Everett Nowell suggested that the matter should be referred to an electrical expert familiar with the conditions at the project. No action was taken. After the meeting was adjourned, further discussion was had during which either Cliff Mortensen or Cliff Mortensen's attorney who was with him made an accusation concerning Cash Cole of "milking" the company, whereupon Cash Cole walked out.

20. Also listed as defendants in this cause are First National Bank of Fairbanks, a corporation, and Bank of Fairbanks, a corporation. The records of this litigation show an appearance and answer on behalf of the two banking institutions by the same attorney, namely, Walter Sczudlo, attorneys for plaintiff.

21. Therefore, pursuant to the true facts herein set forth, the Complaint filed in the above-entitled cause should be dismissed and a Motion filed herewith be denied.

Dated at Seattle, Washington, this 3rd day of August, 1953.

/s/ CASH COLE.

Subscribed and Sworn to before me this 3rd day of August, 1953.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

Seattle Trust and Savings Bank
Second Avenue at Columbia Street
Seattle 4, Washington

30 June, 1953.

Fairview Development, Inc.,
Fairview Manor,
Building #2 Office,
Fairbanks, Alaska.

Attn: Mr. Cash Cole.

Re: ISC Trust T241-1—Fairview Manor,
Fairbanks, Alaska,
FHA Project #130-42013.

Dear Sirs:

After my inspection of this apartment property, I communicated with the Institutional Securities Corporation of New York, for whom we service the underlying mortgage and we now have their instruction to report to you in detail of our findings on the condition of the buildings and to request that you prepare for us a schedule for repairs, so that some assurance can be given to the Institutional Securities Corporation, that the necessary work is to be done before the arrival of cold weather.

First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance, but after my examination of the premises and familiarizing

myself with problems which you have had to face, one can not help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.

You must realize that the various claims and interests of the individual owners of the stock of Fairview, and their individual problems are of no concern to the mortgagee or to us as servicing agent for them; our interest at this point is purely one of preservation of the security of the mortgage.

The requirements for the project, as a whole are:

1. Correction of grade of sidewalks, to bring them above the level of the moisture. We recommend that all sidewalks be covered with an additional 5½ to 6 inches, up to the level of the present first steps.

2. A program for interior decoration should be begun, and until some better yardstick is offered, we think the figure in the FHA Project Analysis estimated at \$19,168.00 per annum would be an acceptable figure. If interior decorating is done on a program basis, repainting the interiors and trim as necessary, you will not face heavy expenditures with available funds lacking at some future date, and your occupancy should continue to be maintained at a high level.

3. Landscaping and planting has not been satisfactorily completed, and this must be done in order

to comply with the building program. Unless this is done to implement the attractiveness of the project, we feel that competition with other attractive rental units will seriously impair the occupancy of your apartments.

We call to your attention that the National Bank of Commerce here in Seattle, holds a deposit in escrow of \$8,800.00, to assure the completion of landscaping and planting; and that it also holds in addition the sum of \$1,080.00 for completion of curbs and driveways. We are informed that the FHA has accepted the curbs and driveways and therefore assume that you may now seek the release of those funds; however, we find no record of their acceptance of the landscaping and planting and so we assume that the work must be completed in a manner satisfactory to the FHA and that you may thereafter seek the release of the funds held for that purpose in the aforementioned escrow.

Our review of the individual buildings indicates the following repairs to be necessary, in addition to the above specific requirements for the over-all project:

Building #1: Exterior paint is needed on the west end of Section "E"; on the west end of Section "H"; and on the south side of Section "H." We concluded that these items are urgent for the preservation of the security.

Building #2: Exterior paint is needed on the west side of Section "H"; on the east side of Section "H"; and on the south sides of Sections A, E,

D & E, also G & H; and on the west side of Section "A."

The ridge cover has apparently been damaged either in the process of installing vents on the building or in ice removal, and this should be immediately checked and straightened or replaced.

Also the grade of the driveway should be changed from the rear of the building to carry the water away from the building at Section "G"; to eliminate the possibility of water draining into the boiler room.

Building #3: Exterior paint is badly needed on the west end of Section "H"; on the south side of Section "H," and on east side of Section "H." Also there is evidence of some necessary roof repair on this building and it is recommended that aluminum patches be put over the holes created by ice chopping. It is also noted that the change-over on the 3-way valve was to have been completed during the early part of June, and we should appreciate your confirmation that this work has been satisfactorily completed.

Building #4: Exterior painting is urgently needed on the south and west sides of Section "A"—on the south side of Section "B," and on the east side of Section "H." Also, some of the driveway adjacent to this building has been damaged and should be replaced. During the early part of June you were in the process of completing the change-over onto the 3-way valve in this building also, and we shall

apreciate your advice whether that work has been satisfactorily completed.

In connection with the roof repairs mentioned as necessary regarding Building #3, it may be found that there are additional holes in the roof structures on parts of the other buildings, although we were unable to find them without the proper equipment, and it is suggested therefore that a careful survey of all of the roofs be made by a competent workman, who would make all of such repairs as are found necessary.

We shall appreciate your immediate acknowledgment of this letter, and a detailed report in the very near future of your plan for the maintenance of the property, which we deem so necessary in order to protect the security of the mortgage and to eliminate waste to the property.

Yours very truly,

/s/ J. F. CAMPBELL,

Vice President and Manager,
Mortgage Loan Department.

JFCampbell:awe

Via airmail

Cc—Mr. C. A. Carroll,
FHA Terr. Director,
Juneau, Alaska.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated and Agreed by and between the plaintiffs herein and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen and Co., Inc., and the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., as follows:

1. For and in consideration of the sum of one thousand (\$1000) dollars to be paid in cash by Cash Cole, Nelse Mortensen, Cliff Mortensen and Frank Henderson, agree to assign, transfer and convey all of their capital stock in Fairview Development, Inc., to wit, 450 shares of said capital stock to Cash Cole or his assigns.

2. Nelse Mortensen, Cliff Mortensen and Frank Henderson, Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., do hereby release and discharge the defendants above named, and Fairview Development, Inc., from any and all claims, damages, liability or demands whatsoever; and in consideration of such release and discharge of all liability, Fairview Development, Inc., agrees to pay to Nelse Mortensen, Cliff Mortensen and Frank Henderson, the sum of eighty-nine thousand (\$89,000) dollars without interest, as herein provided; thirty-seven thousand eight hundred (\$37,800) dollars of said payment shall be funds repaid to Nelse Mortensen, Cliff Mortensen and Frank Henderson, heretofore advanced to Fairview Development, Inc., as so-called front money, and the balance of fifty-

one thousand two hundred (\$51,200) dollars shall be paid in consideration of the release of any and all claims against Cash Cole, Everett Nowell, Fairview Development, Inc., and Bayview Realty, Inc., and in settlement of all disputes between the parties. Said payment shall be made to the parties jointly, or may be divided equally and paid to each of them as may be directed by the said parties. Said sum in the release and settlement of any and all liability against the parties as provided herein shall be paid in the following manner; \$6800.00 at this time and \$3200.00 on or before December 31, 1953, and \$5,000.00 payable April 15, 1954, and quarterly thereafter (every 3 months) annually, until the full sum of \$89,000.00 has been paid, without interest. It is understood and agreed that said obligation in the sum of \$89,000.00 shall be secured by Cash Cole, Everett Nowell and/or Bayview Realty, Inc., placing in escrow all of the capital stock of Fairview Development, Inc., (except the 100 shares of preferred stock) consisting of 450 shares by this agreement purchased by said persons, and 450 shares of said capital stock owned by Bayview Realty, Inc. In the event of any default in the payment of any installment required to be made, said Nelse Mortensen, Cliff Mortensen and Frank Henderson may immediately declare the full balance of said obligation due and owing and may require the escrow holder to deliver said capital stock to them as their property, conveying all right, title and interest in and to all of said capital stock, except said 100 shares of preferred stock, to Nelse Mortensen, Cliff

Mortensen and Frank Henderson in full satisfaction of the sum of \$89,000.00, or such balance as may remain due at that time. It is further understood and agreed that Cash Cole, Everett Nowell and/or Bayview Realty, Inc., may deliver, or cause to be delivered, all the said capital stock, to wit, 900 shares of the capital stock of Fairview Development, Inc., (not including 100 shares of preferred stock), to Nelse Mortensen, Cliff Mortensen and Frank Henderson in full settlement of said obligation of \$89,000.00, or any balance thereon remaining at any time that said obligation may be in default. Fairview Development, Inc., Bayview Realty, Inc., and/or Cash Cole agree to make regular quarterly reports as to the financial status of Fairview Development, Inc., available to Nelse Mortensen, Cliff Mortensen and Frank Henderson in order that they may be apprised of the operation and security given for the indebtedness created herein.

3. Nelse Mortensen, Cliff Mortensen and Frank Henderson agree to pay to Everett Nowell the face of that certain promissory note held by Everett Nowell, in the sum of approximately \$6800.00 in full settlement and satisfaction thereof and in dismissal of the pending lawsuit in connection with said obligation.

4. It is understood and agreed that there is pending litigation by Pilip & Butt Painting Contractors, Inc., and C. H. Keaton against plaintiffs and others and that Nelse Mortensen, Cliff Mortensen and

Frank Henderson shall be responsible and liable for any recovery that may be had as against them in said litigation and shall be entitled to retain the benefits of any judgment recovered in their favor, as a result of said litigation.

5. It is understood and agreed that there is approximately \$8800.00 held by the National Bank of Commerce in Seattle, Washington, in connection with the landscape work, and it is agreed that said funds shall be paid to Nelse Mortensen, Cliff Mortensen and Frank Henderson.

6. Nelse Mortensen, Cliff Mortensen and Frank Henderson agree to hold Fairview Development, Inc., harmless from any claim by reason of legal services performed by Lycette, Diamond and Sylvester as attorneys for said corporation.

7. It is understood and agreed that all pending litigation between the plaintiffs and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., or any of them, on the one hand, and Cash Cole, Everett Nowell and Bayview Realty, Inc., or any of them on the other hand, be and the same is fully settled and shall be dismissed with prejudice and without costs, including this present action.

8. Cliff Mortensen and Frank Henderson agree to resign as officers and directors of Fairview Development, Inc., on their successors being elected.

9. It is further understood and agreed that the Articles of Incorporation of Fairview Development, Inc., shall not be changed or modified, or the number

of shares of capital stock issued be increased or decreased, without the consent and approval of Nelse Mortensen, Cliff Mortensen and Frank Henderson, or unless the obligation in the sum of \$89,000.00 provided for herein shall have been paid in full, it being the intention and understanding of the parties that as security for said indebtedness there shall remain in escrow all of the voting capital common stock of the corporation so that, in the event of any default, said Nelse Mortensen, Cliff Mortensen and Frank Henderson shall be entitled to all of the outstanding capital common stock of said Fairview Development, Inc., free of any and all liability whatsoever of any and all claims which Bayview Realty, Inc., or Everett Nowell or Cash Cole or the successors or assigns of either of them may have or claim to have against Fairview Development, Inc., and/or Cash Cole and/or W. A. Rushlight or A. G. Rushlight & Co., and any obligations of Fairview Development, Inc., other than ordinary normal debts or obligations incurred during the usual course of business of said corporation.

10. It is understood and agreed that this stipulation and settlement agreement shall be approved and confirmed by the court herein; and upon such confirmation, shall be binding and effective and the parties hereto, or any corporations controlled by them, will execute and deliver any such documents, instruments or conveyances as may be necessary or required to put into full force and effect the terms

and provisions of this agreement, including the release to Nelse Mortensen, Cliff Mortensen and Frank Henderson of funds presently being held by the National Bank of Commerce of Seattle, in escrow to cover liens filed against Fairview Manor at Fairbanks, Alaska.

11. It is hereby stipulated and agreed by and between all parties hereto that this agreement constitutes a full and complete satisfaction, compromise and release of any and all claims of whatsoever kind which the plaintiffs above named and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., may have against the defendants Cash Cole and Everett Nowell and Bayview Realty, Inc., or any of them, or which the said Cash Cole, Everett Nowell or Bayview Realty, Inc., may have against the plaintiffs above named and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., or any of them, except as provided for herein.

NELSE MORTENSEN, CLIFF MORTENSEN
and FRANK HENDERSON, and FAIRVIEW
DEVELOPMENT, INC.,

/s/ JOSEF DIAMOND,

By /s/ WALTER SCZUDLO,

Their Attorneys.

CASH COLE, EVERETT NOWELL, and BAY-
VIEW REALTY, INC.,

/s/ CASH COLE,

Cash Cole, et al., vs.

/s/ EVERETT NOWELL,

/s/ NICHOLAS JAUREGUY,

/s/ JOHN HEDRICK,

Their Attorneys.

FAIRVIEW DEVELOPMENT,
INC.,

By /s/ EVERETT NOWELL,
President.

By /s/ CASH COLE.

Approved:

/s/ CLIFF MORTENSEN,

/s/ FRANK HENDERSON,

/s/ EVERETT NOWELL.

BAYVIEW REALTY, INC.,

By /s/ EVERETT NOWELL.

NELSE MORTENSEN CO.,
INC.,

By /s/ CLIFF MORTENSEN.

[Endorsed]: Filed October 9, 1953.

[Title of District Court and Cause.]

FINAL DECREE AND ORDER

This matter coming on to be heard upon the motion of plaintiffs and upon written stipulation and agreement of all of the principal parties hereto, heretofore filed herein on October 9, 1953; and it appearing and the court finding that said parties have, by said stipulation and agreement, settled and compromised their respective claims and stipulated that said agreement constitutes a full and complete satisfaction, compromise and release of any and all claims of whatsoever kind, which the above-named plaintiffs and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., may have against the defendants Cash Cole and Everett Nowell and Bayview Realty, Inc., or any of them, or which said Cash Cole, Everett Nowell or Bayview Realty, Inc., may have against the plaintiffs above named, and Nelse Mortensen-Alaska Co., Inc., and Nelse Mortensen Co., Inc., or any of them, except as provided in said stipulation and agreement; and that said parties have provided in said stipulation and agreement that upon confirmation and approval of said stipulation and settlement agreement it shall be binding and effective upon the parties thereto, and that said parties or any corporations controlled by them will execute and deliver any such documents, instruments or conveyances as may be necessary or required to **put into full force and effect** the terms and provisions of said agreement; and said stipulation and agreement contains other provisions and terms with

respect to the compromise of the various claims of the parties; and the court having heard statements of counsel, and being otherwise advised in the premises,

It is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That said written stipulation and settlement agreement executed by all of the parties hereto, except the two defendant banks, and filed herein on October 9, 1953, be and it is hereby approved and confirmed, and said stipulation and agreement, by this reference thereto, is incorporated in this final decree and order the same as if fully set out herein, and shall be and is now binding upon said parties and effective from the date of filing said agreement.

2. That the appointment of Robert E. Sheldon as receiver on October 8, 1953, for the property involved in the above-entitled cause be and it is hereby terminated as of the date hereof, and said Robert E. Sheldon be and he is hereby allowed for his services and fees the sum of \$300.00, which the said Fairview Development, Inc., an Alaska corporation, be and it is hereby directed to pay to said Robert E. Sheldon, on or before ten days from the date hereof.

3. That the above-entitled cause be and it is hereby dismissed as of the date hereof.

Dated this tenth day of October, 1953.

/s/ HARRY E. PRATT,

United States District Judge.

[Endorsed]: Filed and entered October 13, 1953.

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaska corporation, and Fairview Development, Inc., an Alaska corporation; Everett Nowell, individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.; Bayview Realty, Inc., an Alaska corporation, and for answer to the Complaint on file herein admit, deny and allege as follows:

I.

Defendants admit the allegations of Paragraph I, of plaintiffs' Complaint.

II.

Defendants deny each and every allegation contained in Paragraph II of plaintiffs' Complaint.

III.

Defendants admit that Cash Cole is an officer and director of Fairview Development, Inc., and Bayview Realty, Inc., and deny each and every other allegation contained in Paragraph III of plaintiffs' Complaint.

IV.

Defendants admit that Bayview Realty, Inc., is an Alaskan corporation; that Bayview is the owner of at least 50% of the capital common stock of the plaintiff, Fairview Development, Inc., comprising

450 shares of said capital stock which represents 50% of the voting stock of said corporation. Admit that Cash Cole and others control the defendant, Bayview Realty, Inc.; and deny that Everett Nowell has any right, title or interest in Bayview Realty, Inc.

V.

Defendants admit the allegations of Paragraph V of plaintiffs' Complaint.

VI.

Defendants admit the allegations of Paragraph VI of plaintiffs' Complaint.

VII.

Answering Paragraph VII of the Complaint on file herein, these answering defendants admit that the plaintiff, Fairview Development, Inc., was organized for the purpose, among other purposes, of constructing an apartment housing project at Fairbanks, Alaska, upon land leased from the City of Fairbanks, which said land was originally leased by Bayview Realty, Inc., from the said City of Fairbanks, Alaska, for a period of 75 years; that plaintiff, Fairview Development, Inc., did obtain a loan from the National Bank of Commerce, a national banking corporation, organized and existing under the laws of the United States, located in the City of Seattle, Washington; that the plaintiff, Fairview Development, Inc., did enter into a contract with Nelse Mortensen-Alaska, Inc., an Alaska corporation, for the construction of said housing

project, and that the said Nelse Mortensen-Alaska, Inc., did enter upon the construction of said housing project. These answering defendants deny each and every other allegation therein contained.

VIII.

Answering Paragraph VIII of the Complaint on file herein, these answering defendants admit that as apartment units were ready for occupancy that Cash Cole and Everett Nowell, acting pursuant to the terms of agreements previously made between plaintiffs and these answering defendants, and with the knowledge, consent and approval of the plaintiff, did manage and operate, and are managing and operating said units and housing project on behalf of Fairview Development, Inc. These answering defendants deny each and every other allegation therein contained.

IX.

Answering Paragraph IX of the Complaint on file herein, these answering defendants admit that they have conducted the management and operation of said units and housing project, pursuant to the agreements heretofore referred to, all with the knowledge, approval and consent of the plaintiffs. These answering defendants further admit that they have accounted to plaintiff and all other necessary parties in accordance with the agreements heretofore referred to and with the knowledge, consent and approval of plaintiffs, and in this regard have retained Herbert Lofquist, an accountant, to conduct the bookkeeping and accounting of said operation

and management, all pursuant to the agreements heretofore referred to and with the consent, approval and knowledge of plaintiffs; these answering defendants deny each and every other allegation therein contained.

X.

Defendants deny each and every allegation contained in Paragraph X of plaintiffs' Complaint.

XI.

Answering Paragraph XI of the Complaint on file herein, these defendants deny each and every allegation contained therein.

XII.

Defendants deny each and every allegation contained in Paragraph XII of plaintiffs' Complaint.

XIII.

Defendants admit that the First National Bank of Fairbanks, has on deposit funds of Fairview Development, Inc.; but deny each and every other allegation contained in Paragraph XIII of plaintiffs' Complaint.

XIV.

Answering Paragraph XIV of plaintiffs' Complaint on file herein, these defendants admit that the defendant, Bank of Fairbanks, has on deposit funds of Fairview Development, Inc.; but deny each and every other allegation contained therein.

XV.

Answering Paragraph XV of the Complaint on

file herein, these defendants admit that Everett Nowell called a special meeting of the Board of Directors of the plaintiff corporation for October 29, 1952, at the office of said Fairview Development, Inc., in Fairbanks, Alaska; and these answering defendants further admit that Cliff Mortensen attended said special meeting. These answering defendants deny each and every other allegation contained therein.

Wherefore, these answering defendants, having fully answered the Complaint of the plaintiffs, pray for a decree of this Court as follows:

1. That the Complaint on file herein be dismissed with prejudice.
2. That these answering defendants have their costs and disbursements expended, including reasonable fees incurred in their behalf.

/s/ WARREN A. TAYLOR,
Of Attorneys for Defendants.

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he is the defendant in the above-entitled action; he has read the foregoing Amended Answer, knows the contents thereof, and that the same are true, as he verily believes.

/s/ CASH COLE.

Subscribed and Sworn to before me this 8th day of January, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for
Alaska.

My commission expires: 8/11/55.

Receipt of Copy acknowledged.

Lodged January 8, 1954.

[Title of District Court and Cause.]

**MOTION TO SET ASIDE AND VACATE THE
STIPULATION AND JUDGMENT BASED
THEREON**

Come Now the above-named defendants, Fairview Development, Inc., and Bayview Realty, Inc., and Cash Cole, and for and on behalf of these defendants move this Honorable Court to vacate said Stipulation and Judgment rendered herein and relieve all of said defendants therefrom and to set aside, vacate, modify and relieve these defendants from the Judgment rendered in the above-entitled cause based upon said Stipulation for the following reasons, to wit:

(a) That Rule 60 of the Federal Rules of Civil Procedure gives this Honorable Court power and authority to set aside said Stipulation and Judgment

ment based thereon, and in support of the Motion states: That fraud was practiced by the prevailing parties, to wit: The plaintiffs and the defendant, Everett Nowell, against these particular movants.

(b) That this Motion is made within the time allowed by Rule 60 referred to above.

(c) That at the time the Stipulation was executed the said Cash Cole was extremely ill, suffering from results of a heart attack which had confined him to his room and bed and incapacitated him to properly think, and at a time he was being given drugs by a reputable physician to alleviate his physical suffering, and as a result thereof, he was unable to comprehend and did not know the meaning of said Stipulation and signed said Stipulation through mistake, inadvertence, surprise, excusable neglect and fraud practiced by the prevailing parties.

(d) That the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson acted by and through these agents, including, but not limited to, the actions of Everett Nowell and W. A. Rushlight who pretended to be good friends of said Cash Cole, and Everett Nowell was an officer of the said corporation, and took advantage of the sickened condition of Cash Cole and caused him to enter into said Stipulation while sick in bed and unable to read and understand said Stipulation and contents of said Stipulation were falsely interpreted by the said W. A. Rushlight.

(e) That said Stipulation and Judgment ren-

dered therein is unconscionable, impossible of performance, confiscatory of these movants' interest in the properties involved therein, to wit: Fairview Manor, owned by Fairview Development, Inc., of which these movants are the owners thereof.

(f) That the said Everett Nowell aided the plaintiffs in this action in defrauding these movants and, as a reward for his entering into said conspiracy and for having practiced fraud and deceit on these movants, he did receive \$1,000.00 in cash and a signed obligation executed by these movants, by which he was to receive \$44,000.00 in addition to the amount he did receive, and that no part of said sum was due him and for which there was no consideration.

(g) That the Stipulation purports to be executed by Bayview Realty, Inc., and Fairview Development, Inc., which act was unauthorized by either the stockholders or by the Board of Directors, and was therefore the unauthorized act; not sufficient to bind said corporations.

(h) That W. A. Rushlight received for his part of the conspiracy a note executed by the Fairview Development, Inc., acting by and through these movants, for the payment of \$25,000.00; that there was no consideration whatsoever for the execution and delivery of said note, and these movants received no consideration whatsoever for said note, and the same should be set aside.

(i) That Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, as a result of said conspiracy, caused to be incorporated in said Stipulation a promise to pay by the Fairview Development, Inc., to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, the sum of \$89,000.00, which promise to pay, made by Fairview Development, Inc., acting by and through these movants, was without consideration, was wholly void, and was procured by fraud and misrepresentation; this movant Cash Cole being overreached while sick and unable to transact any business. This movant, Cash Cole, informs the Court that he never, at any time, while physically or mentally able to transact business, ratified or confirmed said Stipulation and that the same should be set aside, vacated and held for naught, and that the Judgment based thereon should be vacated, set aside and held for naught, and these movants released from all liability thereunder.

This Motion is based upon all pleadings in the above-entitled cause, the Stipulation and Decree of Judgment rendered herein and the affidavits attached hereto.

Wherefore, movant prays for an Order of this Court setting aside and vacating the Stipulation and Judgment based upon said Stipulation; and that movant be allowed to file an amended answer and Cross-Complaint to plaintiffs' Complaint, and that the plaintiffs herein be restrained and enjoined from enforcing the provisions of said Judgment

pendente lite, and for such other and further relief as to the Court may seem just and equitable.

BELL & SANDERS and
WARREN A. TAYLOR,
Attorneys for Movant.

By /s/ WARREN A. TAYLOR,
Of Movant's Attorneys.

Duly Verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE STIPULATION AND JUDG-
MENT BASED THEREON

United States of America.

Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he is one of the defendants in the above-entitled action and makes this affidavit in support of the above-entitled Motion to set aside the stipulation and judgment based thereon.

That during the week ending October 4, 1953, the trial of the above-entitled cause was being heard before the District Judge of the above-entitled Court.

That on the 5th day of October, 1953, the affiant

suffered a severe heart attack which was of such severity that he was confined to his bed and required the services of a physician, Dr. Joseph M. Ribar, M.D., of the Fairbanks Medical and Surgical Clinic, who informed affiant that, under no circumstances, could affiant proceed as a witness in the said cause.

That affiant remained under the care of said physician for some time thereafter and received medication and treatment from said physician.

That affiant was administered certain drugs or medication that affected his eyes to such an extent that he was unable to see, and while in such condition, was prevailed upon to execute the stipulation filed in the above-entitled cause on the 9th day of October, 1953.

That while confined to his bed, and unable to read, the plaintiffs, acting in concert with one W. A. Rushlight, who was a house guest of affiant and who pretended to be a friend of affiant, induced affiant to sign said stipulation, said affiant not knowing the contents and import of said stipulation, and relied upon the statements of said A. G. Rushlight Company to the contents thereof which were false and fraudulent.

That said W. A. Rushlight, at the same time and place, and under the same conditions and circumstances hereinbefore set out, induced the affiant to execute a demand note to A. G. Rushlight Company for the sum of \$25,000.00, there being no consideration for the execution of said demand note, and

affiant not knowing at the time that the said instrument was in fact a demand note.

That the said W. A. Rushlight did, at the same time and under the same conditions and circumstances hereinbefore set out, induce the affiant to execute an agreement whereby affiant agreed to pay to Everett Nowell the sum of \$45,000.00. That there was no consideration for the execution of the same.

That the affiant did not ascertain the intent and import of the said stipulation, the demand note and the agreement with Everett Nowell until about one month after the execution of the instruments. That affiant had been administered drugs for his heart condition which enlarged his eyes so that he was unable to read for approximately one month after the execution thereof.

That the enforcement of the judgment based upon the stipulation between affiant and Nelse Mortensen, Cliff Mortensen and Frank Henderson, would be confiscatory of affiant's interest in Fairview Development, Inc., in that it is impossible to fulfill the terms of said stipulation and judgment.

That the monthly average income from Fairview Manor, the apartment project of Fairview Development, Inc., is between \$31,000.00 and \$33,000.00. That the payment on the first mortgage amounts to \$21,700.00 per month; coal for heat \$3,500.00; electric power \$1,660.00 and labor \$5,000.00; incidentals, \$1,000.00, making a total of \$32,860.00. That after the payment of all expenses and fixed charges at the

end of November, 1953, there was a net balance of \$130.00. That the income for December, 1953, will be approximately the same, but the expenses will be higher in heating and electrical energy. That at the date of the execution of this affidavit, affiant had not yet received the bill for coal for the month of December, 1953, but affiant believes that by reason of the colder weather, the same will be considerably higher than in previous months.

Affiant believes and therefore avers, that the said actions of Cliff Mortensen, Nelse Mortensen, Frank V. Henderson, W. A. Rushlight and Everett Nowell, conspired together to secure all the stock of affiant in said Fairview Development, Inc., as they well knew at the time of the execution of the documents and instruments hereinbefore mentioned that affiant could not make the payments provided in said stipulation, demand note, and agreement, and by the terms of said instruments, they would get all of affiant's stock in said corporation without the payment of any money to affiant. That all of said persons had access to the books of the corporation and well knew the income from rentals and the payments required by the terms of the mortgage, and the ordinary expenses of operating the apartment project, and deliberately took advantage of affiant's critical heart condition and inability to read to perpetrate the fraud upon him.

That the enforcement of the judgment entered herein would amount to a virtual forfeiture and con-

fiscation of affiant's interest in said corporation, without any consideration therefor.

That the said action was instituted by the plaintiffs without any authorization or resolution by the directors of Fairview Development, Inc., and was therefore unwarranted and illegal.

That at no time was affiant's wife or son, Tom Cole, informed of the matters discussed in the negotiations leading to the execution of the said documents, nor did his attorneys talk with him during said negotiations.

That affiant was in great pain and suffering during all the negotiations and was unable to comprehend the intent and import of said documents and instruments.

/s/ CASH COLE.

Subscribed and Sworn to before me this 7th day of January, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE STIPULATION AND JUDG-
MENT BASED THEREON

United States of America,
Territory of Alaska—ss.

Tom Cole, being first duly sworn, upon his oath deposes and says:

That he is the son of Cash Cole, one of the defendants in the above-entitled action, and that he is also a director of Fairview Development, Inc.

That affiant has been connected with the operation of Fairview Manor, an apartment house owned by Fairview Development, Inc., and is thoroughly familiar with all matters connected therewith, including income from rentals, payment of fixed charges on the mortgage indebtedness and the expenses of operation of said apartment house.

That on the 5th day of October, 1953, while the trial of the above-entitled action was on trial before the Honorable Harry E. Pratt, the said Cash Cole suffered a severe heart attack, which necessitated the discontinuance of the trial, as the said Cash Cole was ordered by his physician, Joseph M. Ribar, M.D., not to take further part in said trial, and was also ordered to bed and to complete quiet. That the said doctor administered certain drugs to said Cash Cole to relax the arteries and take some of the strain

off his heart. That said drugs caused his eyes to dilate to such extent that he was unable to read print.

That the day following said heart attack the plaintiffs, Nelse Mortensen, Cliff Mortensen, Frank V. Henderson and Everett Nowell, acting in concert with one W. A. Rushlight, a house guest of said Cash Cole, and who pretended to be a close personal friend of Cash Cole, began negotiations with said Cash Cole regarding the proposed sale of stock in said corporation of the above-mentioned Nelse Mortensen, Cliff Mortensen, Frank Henderson and Everett Nowell to Cash Cole.

That the said W. A. Rushlight, acting for and on behalf of the said parties, plaintiff and Everett Nowell, and for himself, gained access to the bedroom of Cash Cole, contrary to the orders of said physician and induced said Cash Cole to execute the stipulation upon which the judgment in the above-entitled cause is based; and also induced said Cash Cole to enter into an agreement with Everett Nowell regarding the sale by said Nowell to Cash Cole of Nowell's stock in said corporation; and did induce said Cash Cole to execute a demand note in the sum of \$25,000.00, payable to A. G. Rushlight and Company, the execution of which note had not been authorized by a resolution of the Board of Directors of Fairview Development, Inc., and was not based upon any consideration whatsoever; that the said W. A. Rushlight, at the time of the execution of said documents and instruments, well knew that said Cash Cole was in no condition, physically or mentally, to

execute the same, and that said Cash Cole did not comprehend the intent and import of said instruments.

That the said plaintiffs, Nelse Mortensen, Cliff Mortensen, Frank Henderson, and Everett Nowell and W. A. Rushlight well knew that the provisions of said stipulation, agreement and demand note were impossible of performance by said Cash Cole, as they were fully informed of the financial ability of Fairview Development, Inc., to perform said obligations of said instruments; that they were aware of the gross income of said apartment house and the amount of the payments on the mortgage on the same and the costs and expenses of the operations of the same.

That in December, 1953, the income from rentals was \$35,307.09 for apartments and garages; that the mortgage payment was \$21,700.00; fuel, approximately \$4,000.00; electricity, approximately \$2,000.00; labor, \$5,136.67; redecorating apartments, approximately \$1,000.00; incidentals, approximately \$800.00; making total payments of \$34,636.67, leaving a balance of \$670.42.

That the balance for November, 1953, after the payment of expenses, was \$130.00.

That Nelse Mortensen, Cliff Mortensen, Frank Henderson, Everett Nowell and W. A. Rushlight had access to the books of the corporation and did inspect said books and knew that said corporation was in no condition financially to meet the conditions and

terms of said stipulation, agreement and demand note hereinbefore mentioned.

That, due to the illness of Cash Cole, affiant has had the management of said Fairview Manor and is conversant with the financial condition of the owner thereof, Fairview Development, Inc., and that the statements herein contained are true and correct, as shown by the books of account of Fairview Manor.

/s/ TOM COLE.

Subscribed and Sworn to before me this 7th day of January, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for
Alaska.

My commission expires 8/11/55.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE STIPULATION AND JUDG-
MENT BASED THEREON

United States of America,
Territory of Alaska—ss.

Joseph M. Ribar, M.D., being first duly sworn, upon his oath deposes and says:

That upon the 5th day of October, 1953, affiant was called to the home of Cash Cole, at Fairview Manor,

Fairbanks, Alaska, by the wife and son of Cash Cole, and upon arriving there found said Cash Cole suffering a great deal of pain from a severe heart attack.

That affiant examined said Cash Cole and found his heart condition serious and immediately advised him that under no circumstances could he continue with the trial of the case in which he was a defendant and witness.

Affiant ordered said Cash Cole to remain absolutely quiet and remain in bed until he built up his strength.

That affiant administered drugs, to wit: Demerol, Elixir Donnatal and Aminophylline, Papaverine for the purpose of relieving the pain and relaxing the arteries to ease the strain on his heart. One of said drugs has a tendency to dilate the eyes so that vision is so distorted that reading is impossible.

Affiant ordered Cash Cole to have no visitors until he had recovered some of his strength.

That affiant made several calls on Cash Cole during the following week and found that the patient was slowly recovering his strength and that he was regaining his vision, although he was still a very sick man.

It is the opinion of affiant that at no time within one week after the said heart attack was Cash Cole in a proper physical or mental condition to transact business matters.

/s/ JOSEPH M. RIBAR, M.D.

Subscribed and Sworn to before me this 7th day of January, 1954.

/s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

[Endorsed]: Filed January 8, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
TO SET ASIDE AND VACATE THE STIP-
ULATION AND JUDGMENT BASED
THEREON

State of Washington,
County of King—ss.

The undersigned, Cliff Mortensen, being first duly sworn upon oath deposes and says as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, by the defendants Cash Cole and Bayview Realty, Inc., and in opposition to the supporting affidavits to said motion executed by said Cash Cole and Tom Cole:

1. That he is one of the plaintiffs in the above-entitled cause, and that said cause was filed by Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned and Frank V.

Henderson, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., because of the deadlock in the conduct or management of the affairs of the plaintiff corporation, Fairview Development, Inc., due to failure of the board of directors to proceed; deadlock among the stockholders and members of the board of directors resulting in deadlock and paralysis of corporate functions; dissension and discord as to who in fact comprise the board of directors; mismanagement and improper disposition of funds and dissipation of assets, and impairment of said corporation property by one or more of the principal defendants in the above-entitled cause.

2. That at the time of the trial in the above-entitled cause and the execution of said stipulation filed herein October 9, 1953, and the entry of the final decree and order herein on October 10, 1953, the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson were stockholders of the plaintiff Fairview Development, Inc., owning collectively four hundred fifty (450) shares of its capital stock, which also represented 50% of the voting stock of said corporation. The plaintiff Cliff Mortensen was and is a director and officer of said plaintiff corporation, subject to change by the stipulation.

3. That at the time of the trial and execution of said stipulation and entry of said final decree and judgment the defendants Cash Cole and Everett Nowell were officers and directors of Fairview De-

velopment, Inc., the plaintiff corporation, and were officers, directors and stockholders of Bayview Realty, Inc., the defendant corporation. Said Bayview Realty, Inc., was the owner of 50% of the capital stock of the plaintiff Fairview Development, Inc., comprised of four hundred fifty (450) shares of said capital stock, which also represented 50% of the voting stock of said corporation. Said defendants Cash Cole and Everett Nowell controlled said defendant Bayview Realty, Inc.

4. That at the time of said trial and execution of said stipulation and entry of said final decree Cake, Jaureguay & Hardy and Nicholas Jaureguay of Portland, Oregon, appeared of record herein as attorneys for the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and did not withdraw as such attorneys until December 15, 1953; that John E. Hedrick of Seattle, Washington, appeared and continues to appear of record as attorney for Cash Cole, Everett Nowell and Bayview Realty, Inc., but the undersigned is informed and believes and upon such information and belief, states the fact to be that said Hedrick was primarily the attorney for the defendant Everett Nowell and that said Nicholas Jaureguay was primarily the attorney for said Cash Cole; that prior to said trial J. Hellenenthal of Anchorage, Alaska, and Stephan J. Morrissey of Seattle, Washington, appeared of record herein for said defendants, but did not participate or appear at said trial or in connection with the negotiations resulting in said settlement and final decree; that Joe Diamond and Earle Zinn of Seattle, Washington, and Walter

Sezudlo of Collins and Clasby appeared as attorneys for the plaintiffs.

5. That at the time of the said trial, stipulation and final decree the following additional litigation was pending and subsequently settled by reason of said stipulation and performance thereof by Cliff Mortensen, Nelse Mortensen and Frank Henderson:

a. A. G. Rushlight & Co., a corporation, vs. Nelse Mortensen-Alaska, Inc., a corporation; Fairview Development, Inc., et al., Case No. 7163, in the District Court of the District of Alaska, Fourth Division, filed to foreclose a mechanic's lien claimed by said A. G. Rushlight & Co. against Fairview Manor in the total sum of \$344,973.30, together with interest thereon at the rate of 6% per annum from December 16, 1951, plus attorneys' fees of \$35,000.00 and costs and disbursements; and in which proceeding by cross-complaint Pilip & Butt Painting Contractors, Inc., sought to foreclose their claim of mechanic's lien against Fairview Manor in the sum of \$77,681.62, together with interest thereon from January 1, 1952, plus attorneys' fees in the sum of \$5,000.00 and costs and expenses; and in which proceeding C. H. Keaton, d/b/a Keaton Paint Company, sought to foreclose his claim of lien against Fairview Manor in the sum of \$17,339.44, together with interest thereon from November 20, 1951, and to recover attorneys' fees and costs and expenses.

b. Nelse Mortensen-Alaska, Inc., a corporation, et al., vs. A. G. Rushlight & Co., a corporation, Case

No. 3105, in the District Court of the United States for the Western District of Washington, Northern Division.

c. Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners, doing business as Nelse Mortensen-Alaska Co., et al., vs. Pilip & Butt, Inc., a corporation, et al., Case No. 442980, in the Superior Court of the State of Washington for King County.

d. Fairview Development, Inc., a corporation, vs. Nelse Mortensen-Alaska, Inc., et al., Case No. 3532, in the District Court of the United States for the Western District of Washington, northern division.

For further data concerning these suits reference is made hereby to the affidavit of Frank V. Henderson filed in the above-entitled cause on August 14, 1953, para. 9 thereof.

6. The trial in the above-entitled cause commenced on or about October 5, 1953, and continued that entire day including the taking of the testimony of the defendant Cash Cole on direct examination as an adverse witness for the plaintiffs. That the undersigned is informed and believes and upon such information and belief states the fact to be that that evening said Cash Cole suffered a heart attack, which purportedly made him physically unable temporarily to continue with his testimony as a witness. The following day, October 6, the plaintiffs were prepared to continue with the trial providing the attorneys for defendants and said Cash Cole agreed to complete the trial without requesting its continu-

ance at the conclusion of the plaintiffs' case for the purpose of securing the testimony of said Cash Cole, but said attorney for Cash Cole, Nicholas Jaureguy, refused to agree to further proceedings in the trial on such condition and said trial was thereupon continued from day to day except for the taking of the testimony of Arnoldine Scott, for the purpose of determining the time when Cash Cole could again attend the proceedings.

7. Immediately upon the first continuance on October 6, 1953, the attorneys for Cash Cole and other defendants suggested that negotiations be opened for settlement of the various claims and counter-claims of the plaintiffs, and the defendants, as well as those of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. Such negotiations were commenced in the jury room adjoining the courtroom on the morning of October 6. There were present at that time said Nicholas Jaureguy, said John E. Hedrick, Tom Cole, the son of Cash Cole, said Everett Nowell, Dick Rushlight, Cliff Mortensen, Frank Henderson, Joe Diamond, Earle Zinn, Walter Sczudlo and one or two other persons, who thereafter from time to time and in various places participated in said negotiations until they were concluded. The final offer of settlement made by said Nelse Mortensen, Cliff Mortensen and Frank Henderson, for the purpose of compromising the conflicting claims of the various parties involved and to terminate the deadlock among the stockholders and members of the Board of Directors of Fair-

view Development, Inc., and all dissension and discord, was reciprocal in that said plaintiffs would either purchase the shares of stock of Fairview Development, Inc., owned by the defendants Cash Cole, Everett Nowell, and Bayview Realty, Inc., aggregating 450 shares, for \$1,000.00 and would secure payment of the sum of \$89,000.00 by Fairview Development, Inc., to said Cash Cole, Everett Nowell and/or Bayview Realty, Inc., in consideration of the release and discharge of all claims against them and Fairview Development, Inc., by said Cash Cole, Everett Nowell and/or Bayview Realty, Inc., by pledging all the stock of said Fairview Development, Inc., so purchased, as well as then owned by them, and to assume and settle the claims of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton, or to sell for the sum of \$1,000.00 to said Cash Cole, Everett Nowell and/or Bayview Realty, Inc., the 450 shares of stock of Fairview Development, Inc., owned by said Nelse Mortensen, Cliff Mortensen and Frank Henderson and to release and discharge said Cash Cole, Everett Nowell, Bayview Realty, Inc., and Fairview Development, Inc., from all claims and demands whatsoever made by them upon payment by Fairview Development, Inc., of said sum of \$89,000.00, which payment would be secured by a pledge of all of the stock of said corporation then owned by Cash Cole, Everett Nowell and/or Bayview Realty, Inc., and to be acquired by such purchase from said Nelse Mortensen, Cliff Mor-

tensen and Frank Henderson, and to assume the settlement and payment of the claims of said A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton.

Cash Cole, during these negotiations, refused to sell his shares of stock in the Fairview Development, Inc., and to terminate his interest therein, but insisted on buying out the interests of Nelse Mortensen, Cliff Mortensen and Frank Henderson and settling all their claims against him, the other defendants and Fairview Development, Inc. Said Mortensens and Henderson were willing to sell their interest and settle such claims, providing that a settlement was likewise consummated with A. G. Rushlight & Co., of its claim of mechanic's lien in Case No. 7163.

8. No settlement had been reached by October 8, 1953. On that day the trial was continued generally due to the absence of Cash Cole and refusal of the defendants to stipulate that a continuance would not be requested by them at the conclusion of the plaintiffs' case due to such absence. At the same time an order was entered in this cause appointing Robert E. Sheldon as receiver for the property involved in this cause and all the assets and corporate records of the plaintiff corporation and its business together with all improvements located thereon and all personal property therein, and the rents, issues and proceeds thereof. Said receiver immediately served notice of taking possession.

9. During the above-mentioned negotiations leading to a settlement several compromise plans were from time to time worked out by the several attorneys representing the defendants and those representing the plaintiffs, together with Dick Rushlight, acting on behalf of A. G. Rushlight & Co., and were reciprocal in nature in that Nelse Mortensen, Cliff Mortensen and Frank V. Henderson were willing "to buy or sell" and to settle all conflicting claims, which plans were submitted through one or more of the attorneys acting for Cash Cole and the other defendants to Cash Cole for consideration, and were rejected by him prior to the final settlement agreement contained in the stipulation filed in this cause on October 9, 1953, and approved by this court on October 10, 1953. Apparently said Cash Cole elected on or about October 9, 1953, following the appointment of the receiver above mentioned, the alternate offer of purchasing the interests of said Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson and settling their claims against him and Fairview Development, Inc., upon the terms and conditions contained in the stipulation filed herein October 9, 1953. His attorney, Nicholas Jauregay, refused to execute said stipulation on his behalf until he had submitted said stipulation to Cash Cole for his personal consideration and secured his signature thereto, which stipulation was executed by said Cash Cole individually and on behalf of Fairview Development, Inc. The undersigned is informed and believes and upon such information and belief states the fact to be that prior to the execution

of said stipulation by said Cash Cole it had been discussed with him in his room at Fairview Manor with any one or more of the following persons and in their presence: Said Nicholas Jaureguy, his attorney; Tom Cole, his son; Mrs. Cash Cole, his wife, and Dick Rushlight. Said stipulation was only executed by him after such discussion for the purpose of securing the control of the plaintiff corporation and the discharge of the receiver above mentioned and with full knowledge of all of the terms and conditions contained in said stipulation and the fact that the claims of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton filed against Fairview Development, Inc., and others were being likewise assumed by said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and settled as hereinafter mentioned.

10. Upon consummation of the settlement agreement contained in the stipulation filed in the above cause and as a part thereof, a settlement agreement was made with A. G. Rushlight & Co., of its claim against Fairview Development, Inc., et al., for a lien sought to be foreclosed in case No. 7163. Said stipulation provided for payment of \$125,000.00 to said A. G. Rushlight & Co., by said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and was filed in said Case No. 7163 on October 9, 1953.

11. The final decree of this court approving the stipulation filed herein on October 9, 1953, was entered herein on October 10, 1953, and provided for the discharge of the receiver herein, and further

provided that the said stipulation and agreement contained therein was incorporated in said final decree the same as if fully set out therein and would be binding and was then binding upon the parties thereto and effective from the date of the filing thereof.

12. Said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have complied with and fully performed all of the terms, conditions and provisions of said settlement agreement contained in said stipulation, including payment of \$125,000.00 to A. G. Rushlight & Co., in settlement of its claim in Case No. 7163 pursuant to the stipulation filed therein; dismissal on November 20, 1953, of the amended complaint filed in said case by said A. G. Rushlight & Co.; settlement of the claim of Pilip & Butt Painting Contractors, Inc., sought to be foreclosed in the same case and payment of the amount due said claimant; making provision for defending against the claim of C. H. Keaton in the same suit without any cost to Fairview Development, Inc., and securing dismissal of the other suits pending in the State of Washington described in paragraphs 5 b, c, and d hereinabove; and payment to Everett Nowell of the amount due under a certain promissory note held by him in approximately the sum of \$6,800.00 as provided in paragraph 3 of said stipulation.

13. At the time of the execution of said stipulation, said Fairview Development, Inc., did not pay \$6,800.00 as provided in paragraph 2 thereof or any

part thereof nor have any payments been made as required. Under the terms of said paragraph Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, Nelse Mortensen-Alaska, Inc., and Nelse Mortensen Co., Inc., released and discharged all of the defendants in the above case and Fairview Development, Inc., from any and all claims or demands whatsoever in consideration of the agreement of Fairview Development, Inc., to pay to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson the sum of \$89,000.00 without interest as provided in said stipulation. \$37,800.00 of said payment represented funds repaid to Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and theretofore advanced to Fairview Development, Inc., as so-called "front money." The balance of \$51,200.00 represented consideration for the release of any and all claims against Cash Cole, Everett Nowell, Fairview Development, Inc., and Bayview Realty, Inc., and in settlement of all disputes between the parties. Said sum was payable as follows: \$6,800.00 at the time of the execution of said stipulation, \$3,200.00 on or before December 31, 1953, and \$5,000.00 payable April 15, 1954, and quarter annually thereafter each year until the said total sum of \$89,000.00 had been paid. Said obligation in the sum of \$89,000.00 was specifically secured by said settlement agreement by Cash Cole, Everett Nowell and/or Bayview Realty, Inc., pledging all of the capital stock of Fairview Development, Inc., (except 100 shares of preferred stock), aggregating 900 shares theretofore owned by said defendants or one or

more of them and thereafter to be acquired under the terms of said settlement agreement. Said shares of stock were to be placed in escrow. Demand has heretofore been made on Cash Cole, Everett Nowell and/or Bayview Realty, Inc., to deliver said stock in escrow and they have refused to comply with said demand and with the terms and conditions of said settlement agreement and are in default. Pursuant to the further terms and provisions of said agreement in the event of the non-payment of any installment hereinabove mentioned, said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have declared the full balance of said obligation due and owing and have required that said capital stock aggregating 900 shares be delivered to them as their property, and that the same be transferred to them in full, satisfaction of the said sum of \$89,000.00 or the balance thereof now due. Said defendants Cash Cole, Everett Nowell, and/or Bayview Realty, Inc., have refused and failed to deliver said shares of stock to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson or any one or more of them and continue to refuse to make such delivery, but have accepted and enjoy all benefits derived from the performance of the terms and conditions of said settlement agreement made by said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson.

14. There is no provision in said settlement agreement contained in said stipulation that the said sum of \$89,000.00 or any portion thereof would be paid solely out of the income derived by Fairview Development, Inc., but it was specifically pro-

vided that the defendants Cash Cole, Everett Nowell and/or Bayview Realty, Inc., would secure performance of said undertaking by pledge of all of the stock of said Fairview Development, Inc., as hereinabove stated and more fully set out in said stipulation. The plaintiffs were only partially familiar with the income derived from Fairview Manor and the costs and expenses incurred by the latter. Their access to the corporate books was limited only to a partial examination commencing about the time of the trial for the purpose of determining the nature of various discrepancies appearing in the books, unauthorized expenditures by Cash Cole for salaries and expenses for himself personally and members of his family and said defendant Everett Nowell. Such examination of the books was incomplete and inadequate and had no relation to the settlement agreement covered by said stipulation.

15. There is nothing in said stipulation or in the final decree approving the same, which is unconscionable, impossible of performance or confiscatory of the interests of Cash Cole, Everett Nowell and/or Bayview Realty, Inc.; that said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson had been willing prior to the consummation of said settlement agreement to undertake the same terms and conditions, which were undertaken by Cash Cole and his associates pursuant to said stipulation. The loss of the shares of stock in the Fairview Development, Inc., now suffered by Cash Cole and Bayview Realty, Inc., has resulted from the default in the performance of the terms and conditions of said

settlement agreement by said Cash Cole and Fairview Development, Inc., under his direction.

16. There was no conspiracy or effort to overreach said defendant Cash Cole or Bayview Realty, Inc. The negotiations for settlement above mentioned were conducted by Nicholas Jaureguy, attorney for Cash Cole and Bayview Realty, Inc.; John Hedrick, attorney for Everett Nowell, Dick Rushlight, acting as representative for A. G. Rushlight & Co., Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson and Fairview Development, Inc., and other plaintiffs. These several attorneys represented independent of each other the respective conflicting claims of the parties to this cause. Everett Nowell and said Cliff Mortensen and Frank V. Henderson personally participated in said negotiations, as well as said Cash Cole, to whom various compromise plans were from time to time submitted through his attorney as hereinabove mentioned. The settlement agreement contained in the stipulation was by its terms specifically subject to approval by the court (see para. 10 thereof), and was approved by the court in its final decree entered herein on October 10, 1953, and by the terms of said final decree became effective and binding on all the parties thereto and settled all of their respective claims, demands and differences.

17. There was no fraud or conspiracy practiced or attempted by the plaintiffs or any of them or the defendant Everett Nowell or Dick Rushlight, or any

one or more of the parties to this cause, but careful consideration was given by Nicholas Jaureguy, attorney for Cash Cole, and ultimately Cash Cole himself for the purpose of purchasing the interests of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson so as to gain control of Fairview Development, Inc., and the Fairview Manor, to settle the various claims of said parties against each other, to secure the discharge of Robert E. Sheldon, receiver then recently appointed in the above case as above mentioned, and to secure dismissal of other litigation pending between these parties and avoid further trial in this case, and to secure payment of the claims of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. The interests of these various groups in this case were adverse to each other and each group personally or through its attorneys conducted the negotiations independently for its own benefit and without any misrepresentation with respect to any proposed compromise plan, or opportunity for fraud, or to overreach Cash Cole or any other of the parties involved for its own advantage, since all phases of said negotiation and proposed settlement were known to each of said groups, and especially to said Cash Cole, his son, his wife, and his attorney, who had full possession of all of the facts and all of the corporate books of Fairview Development, Inc., during this entire period.

18. Said Cash Cole as hereinabove indicated did understand the nature of the settlement agreement

and the stipulation filed herein embodying the terms and conditions thereof and was mentally capable of comprehending said terms and conditions. He executed it after refusing to sell his interests upon the same terms and conditions to said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson for the purpose of complete ownership of the common stock of Fairview Development, Inc., and control of said corporation and Fairview Manor; to secure discharge of the receiver then appointed by the court; to avoid the trial in this case; to settle other pending litigation; and to secure payment of the claim of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. There was adequate consideration for such settlement agreement and ample deliberation on his part, as well as with Dick Rushlight, Nicholas Jaureguy, his attorney, his wife and his son. There was no mistake, inadvertence, surprise, excusable neglect, or fraud practiced by the plaintiffs. Said Everett Nowell, W. A. Rushlight, or either of them, or any other person or persons, except their duly authorized attorneys hereinabove mentioned, did not act for Nelse Mortensen, Cliff Mortensen and Frank V. Henderson or other plaintiffs in this case or any of them in the settlement negotiations, or conspire in any manner or take advantage of the purported sickened condition of Cash Cole, but in fact said W. A. Rushlight and Everett Nowell had separate interests of their own to protect, which were those adverse to those of Nelse Mortensen, Cliff Mortensen

and Frank V. Henderson, and which were involved in the settlement discussions and negotiations.

19. The undersigned is not familiar with the nature of the obligation in the sum of \$44,000.00 purportedly executed by Fairview Development, Inc., Bayview Realty, Inc., and Cash Cole to Everett Nowell at or about the time of the stipulation involved in this cause or subsequent thereto and payment of the sum of \$1,000.00 cash. Any such obligation and payment constituted separate negotiations between Everett Nowell and said Cash Cole and others to which Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson were not parties and did not participate in such negotiations and which obligation and payment were not embodied in the settlement agreement evidenced by the stipulation filed herein and represent apparently settlement of conflicting interests between said Everett Nowell and Cash Cole. The undersigned has been informed and believes and upon such information and belief states the fact to be that said obligation represented an agreement by Cash Cole to purchase all the interest of said Everett Nowell in the Fairview Development, Inc., and settlement of all his claims, which obligation was executed by Cash Cole in order to secure the consent and approval of said Nowell to the stipulation filed in this cause and complete ownership and control of Fairview Development, Inc., and Fairview Manor. Said plaintiffs were not a party in any way to the negotiations leading up to said obligation and its consummation and had no

agreement with respect thereto between themselves and said Nowell.

20. That the said stipulation filed in this cause containing said agreement was executed by said Bayview Realty, Inc., and Fairview Development, Inc., through its authorized officers and was further executed by all the then stockholders of said corporation or the overwhelming majority of each of said corporations and consequently such execution constituted approval, confirmation and ratification by said respective stockholders.

21. That the undersigned is not familiar with any note or agreement received by W. A. Rushlight in the sum of \$25,000.00, and if there was any such note or agreement, it represented independent negotiations between said W. A. Rushlight and Cash Cole on or about the time of the execution of the settlement involved in this cause or subsequent thereto, to which negotiations and agreement said Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson and other plaintiffs were not a party, did not participate in, and had not authorized and in which they were not interested. Such agreement or note was apparently delivered to settle the respective interests and claims existing between said Cash Cole and W. A. Rushlight.

22. Said Cash Cole not only participated in the negotiations hereinabove mentioned in the manner hereinabove indicated, terminating in said settlement agreement as evidenced by the stipulation filed

in this cause on October 9, 1953, but also ratified and confirmed said settlement agreement subsequent to his purported illness by accepting the benefits of the performance of the terms and conditions of said settlement agreement by Nelse Mortensen, Cliff Mortensen and Frank V. Henderson resulting in the dismissal of the various litigation hereinabove mentioned, payment by them of \$125,000.00 to A. G. Rushlight & Co., in Case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Painting Contractors, Inc., and release and settlement of other conflicting claims. Said Cash Cole and Bayview Realty, Inc., or others in their behalf, have not offered to make restitution and to place the parties in the same position as they were at the time of the filing of said stipulation on October 9, 1953, in connection with their motion to set aside and vacate said stipulation and the judgment based thereon. They are estopped now from questioning said stipulation and settlement agreement embodied therein and from the final decree based thereon to the prejudice and damage of the plaintiffs and particularly said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson who in good faith entered into said stipulation and settlement agreement and performed the terms and conditions thereof.

Dated at Seattle, Washington, this 10th day of February, 1954.

/s/ CLIFF MORTENSEN.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal]: /s/ MARIAN M. PARKS,
Notary Public for the County of King, State of
Washington.

My commission expires: 2/4/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
TO SET ASIDE AND VACATE THE
STIPULATION AND JUDGMENT BASED
THEREON

State of Washington,
County of King—ss.

The undersigned, Frank V. Henderson, being first duly sworn upon oath deposes and says as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, by the defendants Cash Cole and Bayview Realty, Inc., and in opposition to the supporting affidavits to said motion executed by said Cash Cole and Tom Cole:

1. That the undersigned is one of the plaintiffs in the above-entitled cause and familiar with the proceedings taken therein and the negotiations pre-

ceding and culminating in the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, and approved by the final decree entered herein on October 10, 1953; that the undersigned was present at the time of said negotiations and participated therein.

2. That the undersigned has examined and is familiar with the affidavit executed by Cliff Mortensen in opposition to said motion to set aside and vacate said stipulation and judgment based thereon, filed in this cause and by this reference does hereby adopt said affidavit and make the contents thereof a part hereof as if fully set out herein.

3. That there was considerable controversy and unfriendly feeling between the undersigned and Dick Rushlight, representing A. G. Rushlight & Co., during said negotiations because said Rushlight refused to enter into any settlement of the claims of said A. G. Rushlight & Co., in Case No. 7163 unless likewise a settlement was made with Cash Cole in the above-entitled cause on terms and conditions acceptable to said Cash Cole; and that the final terms and conditions contained in said stipulation were reached after several prior compromise plans had been tentatively accepted by other parties to said negotiations, but each rejected by said Cash Cole through his attorney, Nicholas Jaureguy, after submission to him for consideration.

4. That said defendant Cash Cole, acting individually or as an officer, director and stockholder

of Bayview Realty, Inc., or both on his own behalf, or on behalf of said Bayview Realty, Inc., has been collecting the rents issues and proceeds of the Fairview Manor since the discharge of the receiver, Robert E. Sheldon, in the above-entitled cause on October 10, 1953, and has been in possession of said Fairview Manor and operating it, and doing one or more of the following acts and taking one or more of the following actions either himself or through his agents or representatives:

a. Controlling said apartment housing project and disbursing the rentals therefrom at will and without accounting to the plaintiffs or any one or more of them.

b. Paying to himself and others from rentals and funds belonging to the plaintiff corporation, Fairview Development, Inc., salaries and expenses, which had not been approved or authorized by said plaintiff corporation or the Board of Directors. These salaries and withdrawals have been exorbitant and beyond all proportion to services rendered.

c. He has permitted members of his family and others to occupy apartments in said project rent free without authority or approval of the plaintiff corporation or its Board of Directors.

d. He has antagonized the tenants and been arbitrary in his conduct toward them, resulting in many unnecessary vacancies in said apartment project and loss of income to the plaintiff corporation.

e. He has failed and refused to account for and pay to the plaintiff corporation the funds received by him from rentals and other income from said project; and has failed to account for said funds belonging to the plaintiff corporation to its Board of Directors or to obtain the approval of said Board of Directors for withdrawal of such funds for his own benefit or for the payment of salaries and expenses for himself and others without authority.

f. He has failed to secure authority and approval of the Board of Directors of said plaintiff corporation as to any salaries taken by him or the free rental of certain apartments, or the approval of extraordinary disbursements or expenses or costs, or determination of corporate policies or exercise of corporate powers.

g. He has taken to himself solely the operation, management and direction of the properties of the plaintiff corporation and the determination of corporate policies and the exercise of corporate powers.

h. He has done other acts and taken other actions without authority of the Board of Directors of said plaintiff corporation which are detrimental to said corporation, its stockholders in general and plaintiffs in particular.

5. That the acts and actions of said Cash Cole and his agents and representatives hereinabove mentioned not only before the settlement agreement evidenced by the stipulation filed in this cause, but likewise since said settlement and final decree herein

have operated to the detriment, loss and damage of the plaintiff corporation, Fairview Development, Inc., and the individual plaintiffs, first by reason of their interest in the security provided under said settlement agreement, paragraph 2 of the stipulation, and secondly, as owners of the majority of shares of stock in the plaintiff corporation by reason of the default in the performance of the settlement agreement as more fully disclosed in said affidavit executed by Cliff Mortensen; that such acts and actions are contrary to the general laws of the Territory of Alaska, or the articles of incorporation or the bylaws of said plaintiff corporation.

6. That the property and assets of plaintiff corporation are presently being dissipated and lost by reason of said unlawful and unauthorized acts and actions of said Cash Cole, his agents and representatives; that irreparable injury and damage will be done to the plaintiff, Fairview Development, Inc., and the plaintiffs Cliff Mortensen, Nelse Mortensen, and Frank V. Henderson, and all stockholders of the plaintiff corporation unless this court intervenes for their protection.

7. Under the general laws of the Territory of Alaska, the plaintiffs, jointly and severally, are entitled to the appointment of a receiver for the property of said corporation, Fairview Development, Inc., to collect the rents, issues, income and profit thereof until disposal of said motion to set aside and vacate the stipulation and judgment based

thereon filed by said Cash Cole and Bayview Realty, Inc., and until the shares of stock in said corporation have been secured by said individual plaintiffs by reason of default in the performance of the terms and conditions of said settlement agreement contained in said stipulation, for the purpose of protecting and preserving said property and the interests of said corporation and the interests of all of the stockholders of said corporation.

8. That for further facts concerning the controversy involved in this cause and the unlawful conduct and actions taken by said Cash Cole and other defendants, reference is hereby made to the affidavit of Cliff Mortensen filed herein on June 25, 1953, the separate affidavits of Cliff Mortensen, subscribed August 10, 1953, and August 11, 1953, filed herein on August 14, 1953, the affidavit of the undersigned dated August 12, 1953, filed herein August 14, 1953, and the separate affidavits of J. E. Swanson, Jr., and J. F. Campbell filed herein on August 14, 1953, as well as the testimony taken in this cause of said Cash Cole and Arnoldine Scott at the time of the trial.

Dated at Seattle, Washington, this 10th day of February, 1954.

/s/ FRANK V. HENDERSON.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal] /s/ MARIAN M. PARKS,
Notary Public for the County of King, State of
Washington.

My commission expires: 2/4/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
TO SET ASIDE AND VACATE THE
STIPULATION AND JUDGMENT BASED
THEREON

State of Washington,
County of King—ss.

The undersigned, Joe Diamond and Earle Zinn, being first duly sworn upon oath depose and say as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, by the defendants Cash Cole and Bayview Realty, Inc., and in opposition to the supporting affidavits to said motion executed by said Cash Cole and Tom Cole:

1. That they appeared with Walter Sczudlo of Collins and Clasby, Fairbanks, Alaska, as attorneys for the plaintiffs in the above-entitled cause at the

time of the trial and prior thereto and the negotiations terminating in the settlement agreement evidenced by the stipulation filed herein October 9, 1953, on the basis of which the final decree was entered herein on October 10, 1953; that they are familiar with all of the proceedings and steps taken in this cause and with all phases of said settlement negotiations; that they are now attorneys with said Walter Sczudlo of record for said plaintiffs in this cause.

2. That they have examined the affidavit executed by Cliff Mortensen and filed herein in opposition to said motion to set aside said stipulation and vacate the final decree based thereon and are familiar with the contents thereof and do hereby adopt the same and by this reference make said contents a part of this affidavit the same as if fully set out herein.

Dated at Seattle, Washington, this 10th day of February, 1954.

/s/ JOSEF DIAMOND,

/s/ EARLE ZINN.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal] /s/ MARIAN M. PARKS,

Notary Public for County of King, State of Washington.

My commission expires: 2/4/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Joseph M. Ribar, M.D., being first duly sworn,
on oath deposes and says:

1. That this affidavit is executed to supplement the affidavit heretofore filed in the above-entitled cause and executed by the undersigned.

2. That said original affidavit refers to a heart attack suffered by Cash Cole on October 5, 1953, and the steps taken by the undersigned as a doctor to attend said Cash Cole.

3. That it is the opinion of the affiant that at no time within one week after said heart attack was Cash Cole in a proper physical or mental condition to transact business matters, but I am unable to state as to whether or not he was mentally competent to transact any business matters after the expiration of seventy-two (72) hours following his attack, that is, after October 7, 1954, since the patient was not examined to determine his mental competency.

4. That the drugs mentioned in said original affidavit of the undersigned have a tendency to dilate the eyes so that vision is so distorted that reading is impossible, but such effect is limited to approximately seventy-two (72) hours after the

administration of such drugs and would not continue for approximately one month.

Dated at Fairbanks, Alaska, this 10th day of February, 1954.

/s/ JOSEPH M. RIBAR, M.D.

Subscribed and sworn to before me this 10th day of February, 1954.

[Seal] /s/ MYRTLE L. BOWERS,
Notary Public in and for the
Territory of Alaska.

My commission expires: June 10, 1954.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

**AFFIDAVIT IN OPPOSITION OF MOTION
TO SET ASIDE STIPULATION AND
JUDGMENT BASED THEREON**

State of Washington,
County of King—ss.

Everett Nowell, being first duly sworn on his oath deposes and says:

That he is one of the defendants in the above-entitled action and makes this affidavit in opposition to Motion to Set Aside and Vacate the Stipulation

and Judgment Based Thereon, the supporting affidavits thereto, and Amended Answer filed herein, all made and executed by or on behalf of Cash Cole, another defendant herein.

The above-designated complaint was filed and served by the above-named plaintiffs against the above-named defendants for the reason that the plaintiffs were dissatisfied with the management of Fairview Development, Inc., and Alaska Corporation and requested that the defendant, Cash Cole and your affiant, Everett Nowell, be removed and disassociated from all management or operation of the housing project of Fairview Development, Inc.

The defendants, Cash Cole, individually and as an Officer and Director of Bayview Realty, Inc., another defendant, and Everett Nowell, individually and as an officer and Director of Bayview Realty, Inc., and both as Directors of Fairview Development, Inc., were represented by Cake, Jaureguy, and Hardy, Attorneys at Law, of Portland, Oregon, and Morrissey, Hedrick, Roberts & Dunham, Attorneys at Law, of Seattle, Washington, acting together. The defendants through their counsel prepared and filed an answer to the complaint. Thereafter certain motions were drafted and filed and were argued before this Court, following which this matter came on formally for hearing and trial on or about the 5th day of October, 1953. Attorney, Josef Diamond, of Lycette, Diamond & Sylvester, Attorneys at Law of Seattle, Washington, made an

opening statement to the Court and called certain witnesses who gave testimony in this trial. The transcript of the opening statement and the testimony is part of the record on file and will not be repeated by your affiant. However, the testimony showed certain activities by Cash Cole in relation to his management of Fairview Development, Inc., which was not for the benefit of Fairview Development, Inc., and which your affiant had no knowledge prior thereto.

On or about October 5, following the first day of the trial of this matter, your affiant was informed that Cash Cole had suffered an alleged heart attack. From the time that Cash Cole left the Courtroom on October 5, 1953, to the present date, your affiant has not seen, talked to, communicated with, or in any manner had any contact whatsoever with Cash Cole.

That thereafter, because of the testimony given at the trial in this matter, and because it was alleged that Cash Cole was ill and incapable of any work, this honorable Court appointed a receiver for Fairview Development, Inc. The receiver was ordered to take over all of the assets of Fairview Development, Inc., and manage them under the advice and jurisdiction of this honorable Court.

That thereafter, during the next several days negotiations took place with the idea that the various parties could settle their differences and dispose of their interests in Fairview Development, Inc., in a mutually satisfactory manner.

Originally and for a long time prior to this trial, your affiant and Cash Cole were both represented by Morrissey, Hedrick, Roberts & Dunham, Attorneys at Law, of Seattle, Washington, that after this case was started by the plaintiffs herein, Cash Cole declared that he wanted other and more legal counsel to represent him, at that time the law firm of Cake, Jaureguy and Hardy, of Portland, Oregon, was retained. Up to the time of negotiations the two law firms both acting together and in concert represented both Cash Cole and your affiant. But, when these negotiations started, at that time, John Hedrick worked primarily for the interest of Everett Nowell, your affiant, and Nicholas Jaureguy worked primarily for the interests of Cash Cole. Mr. W. A. Rushlight, a resident of Portland, Oregon, and a house guest of Cash Cole, also took part in the negotiations on behalf of Cash Cole.

The plaintiffs were represented by Josef Diamond, and Earl Zinn, of Lycette, Diamond and Sylvester, Attorneys at Law, of Seattle, Washington, and Walter Szcudlo, of the law firm of Collins and Clasby, of Fairbanks, Alaska. The plaintiffs present were Cliff Mortensen and Frank V. Henderson. During this period of time your affiant, John E. Hedrick, Nicholas Jaureguy, W. A. Rushlight, Joseph Diamond, Earl Zinn, Walter Szcudlo, Cliff Mortensen, and Frank V. Henderson carried on many, many hours of negotiations and discussion. Thereafter the stipulation on file in this matter was drawn and signed by all parties carrying on the negotiations. The original and copies were given

to either Nicholas Jaureguy or W. A. Rushlight for the purpose of having it presented to Cash Cole. Thereafter the original and copies were returned with Cash Cole's signature thereon. Your affiant has no knowledge as to what happened in obtaining the signatures of Cash Cole.

During the same period of time your affiant, John Hedrick, W. A. Rushlight, Nicholas Jaureguy carried on negotiations to sell to Cash Cole, affiant's interests and claims in Fairview Development, Inc. As a result of these negotiations certain contracts and releases were drafted and signed by the interested parties. The original and copies of these contracts and releases were given to Nicholas Jaureguy to obtain the signature of Cash Cole. They were returned to your affiant with Cash Cole's signature thereon. How Cash Cole's signature was obtained your affiant has no knowledge. Cash Cole agreed to purchase your affiant's interests and claims on the same basis as provided for in the stipulation.

Your affiant has given no permission to Cash Cole, or the attorneys now representing him to draft and/or file an Amended Answer in this matter on behalf of your affiant. Your affiant's attorneys have not been discharged or paid by Cash Cole, although these attorneys have no desire to further represent Cash Cole.

That since said negotiations and stipulation having been entered into this matter and since the execution of the contract and releases herein referred to, your affiant has carried out the requirements and

conditions of those contracts and the stipulation; the chief one being that your affiant deliver all of the capital stock owned by him, of Bayview Realty, Inc., to Cash Cole. Cash Cole since that time has turned over the minutes of West Juneau, Inc., and Gastineau Utility, Inc., pursuant to the contracts. Cash Cole has not released his stock in the two last mentioned corporations. That since that time, Cash Cole has recognized the validity of everything done by the fact that he has caused his son, Tom Cole, to become a Director of Fairview Development, Inc., and has placed someone else on the Board of Directors of Fairview Development, Inc., now unknown to your affiant. Cash Cole has taken over the assets of Bayview Realty, Inc., and exercised them to his own design and purpose, your affiant, pursuant to the stipulation has dismissed a cause of action against the plaintiffs which prayed for a recovery in excess of six hundred ninety thousand (\$690,000) dollars. Therefore, Cash Cole desires to have all the benefits of the arrangements freely entered into by him, but to use this Court to escape the liabilities and covenants agreed by him.

Further Your Affiant Sayeth Not!

/s/ EVERETT NOWELL.

Subscribed and Sworn to before me this 11th day of February, 1954.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause.]

MOTION FOR APPOINTMENT OF RECEIVER

Now Come the plaintiffs, in the above-entitled cause, jointly and severally, Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., by their attorneys, and move as follows:

1. That the court appoint a disinterested party as receiver, or reinstate Robert E. Sheldon, formerly acting as receiver in this case, to take over the management and operation of Fairview Manor Apartments at Fairbanks, Alaska, involved in this cause, until the pending motion of said Cash Cole and Bayview Realty, Inc., to set aside the stipulation filed herein on October 9, 1953, and the final decree based thereon entered October 10, 1953, have been heard and disposed, and said defendants have complied with the terms and provisions of said final decree and the said stipulation, to collect all income therefrom and make all disbursements for current operating expenses, payments on the mortgage indebtedness, or otherwise, and account therefor to this court.

2. That said receiver upon qualifying be authorized and instructed to take immediate possession of Fairview Manor Apartments and all other property of the plaintiff corporation, Fairview Development,

Inc.; to collect and preserve the rents, issues and profits thereof; and that he have the general powers of receivers in such cases as well as such special powers as this court may grant to him from time to time; and that any party or parties who are or may come into possession of any portion or portions of said Fairview Manor apartments attorn to said receiver and pay him rental for the use and occupancy of such portion or portions.

3. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, their heirs, special representatives, successors, assigns, agents, attorneys, employees and any representatives whatsoever, be forthwith removed and disassociated from all management or operation, or any aspects thereof, of Fairview Manor Apartments, or any other matter relating to said project, or to the affairs of said corporation, and that said defendants and each of them be directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation by said receiver until further order of this court.

In support of said motion reference is hereby made by said plaintiffs to the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, the final decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, affidavits filed by plaintiffs in opposition to motion of said Cash

Cole and Bayview Realty, Inc., to set aside said stipulation and vacate said final decree, and the pleadings heretofore filed in this cause and the proceedings heretofore had therein.

Dated at Fairbanks, Alaska, this 12th day of February, 1954.

JOE DIAMOND and
EARLE ZINN,
COLLINS AND CLASBY.

By /s/ WALTER SCZUDLO,
Of Counsel for the Plaintiffs.

Affidavit of Service by Mail attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

CROSS-COMPLAINT

Comes Now, Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaskan Corporation, and Fairview Development, Inc., an Alaskan Corporation; Bayview Realty, Inc., an Alaskan Corporation, and Fairview Development, Inc., an Alaskan Corporation, in their own rights, and cross-complains against the Plaintiffs named in the above-entitled cause to wit: Nelse Mortensen, Cliff Mortensen and Frank V. Hender-

son, individually, and for cross-complaint in the above-entitled cause, alleges and states as follows:

I.

That Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, all acting in alter ego through a corporation which was organized for their purposes, known as Nelse Mortensen-Alaska, Inc., which was not intended to be a separate corporation but was the alter ego of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, which corporation after the contract hereinafter referred to had been entered into, was dissolved by the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, purported to act as trustees of the Nelse Mortensen-Alaska, Inc., and as co-partners doing business as Nelse Mortensen-Alaska, Inc., undertook to perform all work and furnish all materials in construction of the buildings pursuant to the terms of the contract and obtained all of the \$3,080,000.00 from the cross-complainants. That by the terms of said contract, they agreed to construct according to plans and specifications, certain apartments known as Fairview Manor, for the above-named cross-complainants, which they did not do and perform according to the terms of said contract.

II.

That the said Plaintiffs, above named, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, committed acts in violation of the terms of

said contract which materially damaged these cross-complainants who were then and now are the owners of said apartment buildings, by their failure to comply with the terms of said contract, plans and specifications, a copy of said contract being hereto attached, marked "Exhibit A" and made a part hereof as fully as if set out herein in full, and a copy of said plans and specifications are in the possession of the above-named plaintiffs and are hereby referred to and made a part of this cross-complaint by reference as fully as if a copy thereof was attached hereto.

III.

That the said Plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, violated the terms, covenants and conditions of said contract in the following manner and by so doing damaged these cross-complainants, as follows, to wit:

a. The contract, plans and specifications provided that the floor elevations of these buildings should be 435.50 feet above sea level and floor level as built is only 434.72 feet above sea level, making the average floor level of said buildings .78 of a foot lower than it should be; as a result thereof, the water from the melting snow in this vicinity will not drain and great volumes of water will and do drain into and around the basements of all of the buildings and thus cause great damage to the foundations, footings and basements themselves, and as a result thereof, the snow must be removed at an additional and great expense from the vicinity

of the buildings and all of the grounds on which the buildings are constructed and have caused the owners of the said buildings to suffer damage for the costs of the removal of the snow in the Spring of 1953, in the sum of \$10,000.00; and that by reason of its condition, will average costing the Cross-complainants a like sum each year hereafter until some adequate relief is accomplished, and as a result thereof the Cross-complainants have been damaged in the sum of \$100,000.00.

b. That said condition exists throughout all of the buildings except that Building No. 2 was built 1.21 feet lower than it should have been according to the contract, plans and specifications; that Building No. 3 was built .27 feet lower than it should have been built and Building No. 4 was built .58 feet lower than it should have been built, according to the plans thereof, and by a recap and amendment to said plans and specifications by which the contractors were bound, Building No. 1 was 9 inches lower than the plans and specifications called for, Building No. 2 was 1 foot $21\frac{1}{2}$ inches lower than the plans and specifications called for, Building No. 3 was $3\frac{1}{2}$ inches lower than the plans and specifications called for and Building No. 4 was 7 inches lower than the amended recap plans call for, which all wrongful acts brought about the damage placed in Paragraph (a).

c. These cross-complainants further allege that the ground floor levels vary in each building from $3\frac{1}{2}$ to $4\frac{1}{2}$ inches. On account of the drainage prob-

lems of the surrounding properties this is very detrimental to the property.

d. The front sidewalk on the "New C.A.A. Road" (Airport Road) is built below the highway at an elevation of from 121½ inches at the East end of Building No. 2 to 23 inches at the West end of No. 1. The cement walk is right at the toe of the bank and as the slope is dirt, the sidewalk is practically covered with mud, rocks and refuse which spills over onto the lawn.

e. Plan No. 2 provides for the planting of trees or hedge 3 to 4 feet in width and 1450 lineal feet in length and no part of said trees and hedge was ever planted, established or set out, and that the estimated cost of excavating, refilling with top soil and planting hedges and trees is \$25,000.00.

f. That Plan No. 2 further provides that on each extreme side of each building there are shown two planting areas, one being 6 feet by 30 feet and the other being 6 feet by approximately 15 feet, with concrete curbs, top soil and shrubbery to be built, furnished and set in by the contractors in top soil and this has been entirely omitted, leaving undone 800 lineal feet of curb and setting out at least 40 shrubs and the grading surrounding the same and filling with topsoil; that the estimated cost of removing sand and gravel, filling with topsoil is \$2,000.00, and the estimated cost of putting in curbs is \$2,000.00, a total of \$4,000.00.

g. Plan No. 1 shows that cement sidewalks from the West end of C.A.A. Road to and turning North on Cowles Street to the rear of the property was to be built—this sidewalk was never constructed. There is, however, a sidewalk outside the property line from a point 30 feet East of the West end which stops between Buildings Two and Three and there is no sidewalk on Cowles Street and there are no crosswalks from Buildings Three and Four to the property line as provided for in said plans and specifications, thereby leaving undone the building of 8,000 sq. ft. of sidewalks and crosswalks in the area last above described; that the cost of putting in said sidewalks and crosswalks is \$15,000.00.

h. Plan No. 2—"Cube detail" showing 2 inches of asphaltic concrete on 12 inches of gravel. Concrete was substituted, but the 12 inches of gravel was not put under the concrete and the concrete is only 4 inches thick and was placed without proper and adequate foundation and is breaking and will continue to break and it will be necessary to repair and replace said defective concrete with 12 inches of asphaltic concrete as provided in the plans and specifications; that the cost of breaking and removing concrete in place is \$5,000.00; the cost of excavating for classified gravel fill 12 inches in depth is \$5,400.00; 2,600 yards of classified fill is \$14,410.00; 2 inches of asphalt, 31,000 sq. yards @ \$6.00 per yards is \$186,000.00; a total cost of replacing said driveways being \$255,810.00.

i. Plan No. 3—(Apt. E) shows guest closet at entrance door. These were all eliminated completely; that the cost to install 8 guest closets is \$10,000.00.

j. Plans No. 7 and 8—show louvre vents at the ends of gables. Specifications #29:8-07 "Louvres" (a) Where located on plans, #26 gauge galvanized steel, size shown, with copper insect mesh on inside—the contractor did not install any of the louvres on said premises; that the cost of installation, by owner, of gable louvres is \$6,000.00.

k. Plans No. 9 and 11 show handrails on wall sides of all stairways. These were never installed and no such handrails were ever placed there by the contractors, thereby shorting their contract with these cross-complainants to the extent of 1056 lineal feet of such handrails and the installation thereof; that the cost of the handrails and labor installation is \$4,800.00.

l. Plan No. 11 shows 1 $\frac{1}{4}$ inch oak handrails running continuously from the ground floor to the second floor which has been stopped 4 feet short at entrance level and at landing level. (See M.P.R. #29:1207-7 — Handrail.) The specifications also called for handrails on all stairs, as well as walls or substantial balusters or guards on each side. Continuous handrails shall be placed on at least one side of every stair. Stairways 44 or more inches in width to have handrails on both sides. This was never done by the contractors. This cost is included in (k) above.

m. Plan No. 9 shows apartment entrance doors, S.C. (self-closing). These closers were never installed. The cost of 32 door closers @ \$32.50 each is \$1,040.00; cost of installation \$300.00. Total cost \$1,340.00.

n. Plan No. 10 provides and calls for 6 inch concrete base in garages and the said contractors failed and neglected to install this base. A great percentage of the garages and, in most cases, plasterboard walls were used and are from 1 to 3 inches above the floor, leaving said garages unfinished, unsightly and greatly decreasing the value thereof. The cost of putting said garages in condition contemplated by plans and specifications is \$5,000.00.

o. Plan No. 10—With reference to finish schedules of bathroom walls, these were to have Colotyle 4 feet above floor and 6 feet above tub and the contractor only furnished and installed Colotyle 4 feet above the tub and omitted completely to install Colotyle on other walls to the extent of approximately 4,000 sq. feet. The cost of additional 4,000 sq. feet of Colotyle, to install as required by plans; the cost of disconnecting and reconnecting plumbing in each bathroom to finish bathrooms is \$50,000.00.

p. Plan No. 10 specifically provided for wood bumpers in all of the garages to be 6x6 inches, and the contractors installed only lighter and less expensive bumpers which are 4x6 inches and not safe for the stopping of cars coming into said garages; that the cost of installing bumpers, according to the plans

and specifications, is \$3,000.00 for labor and material.

q. Plan No. 11 required the contractors to install wardrobe sliding door frame and casings to be of oak. The contractor installed only the bottom of slideway in oak and the balance in pine or fir; that the cost of installing oak as the door frames and casings of said wardrobe closets is \$500.00.

r. Plan No. 12 provided that the contractors should install 6x6 inch WF 15.5 lb. steel "I" beams over stairs and end bedroom, and the contractor substituted this with a timber 4x12, shorting these cross-complainants 640 lineal feet of 15.5 steel "I" beams, also a shortage of wood timbers to the extent of 2560 board feet; that the cost of the steel "I" beams required by the plans and specifications is as follows: Cost of steel beams, \$2,560.00; additional lumber, \$350.00; labor installing beams, \$25,000.00 for installing 2 beams on 32 stair landings. Total cost \$27,910.00.

s. Specifications Addendum No. 4: P. 38 (b) "Trim" Para. (b) revised to read: " $\frac{3}{4}$ x $3\frac{1}{2}$ " stock molded base on all walls and partitions throughout buildings, except in garages." All base is $\frac{3}{8}$ "x $3\frac{1}{2}$ " bull-nose and greatly detracts from the appearance and strength of said base and trim; that the cost of installing base trim according to plans and specifications, 54,400 lineal feet @ 35c per foot is \$19,040.00.

t. Specifications No. 5: General conditions. "Changes in the Work. The owner, without invalidating the Contract, may order extra work or make changes by altering, adding to or deducting from the work, the Contract Sum being adjusted accordingly. All such work shall be executed under the conditions of the original contract except that any claim for extensions of time caused thereby shall be adjusted at the time of ordering such change.

"In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purpose of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owners signed or countersigned by the Architect or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered." Demand has been made to correct the above and foregoing failures to comply with the terms of the contract and the contractors have failed, neglected and refused to correct and finish their work.

u. Specification No. 5 further provides that the completed property shall be equal to or exceed the requirements of the FHA minimum property requirements for properties of three (3) or more living units, revised in August, 1948, which includes "General Acceptability Requirements" of the "Min-

imum Planning Requirements,” and the “Minimum Construction Requirements” and also provides as follows:

Spec. #29:8-06 (c) “Vent Ducts”: Electric dryers in laundry to be vented through wall. The dryers are vented into the garages, thereby putting the moisture into and on cars, causing condensation in Summer and freezing in Winter. The cost of venting said dryers through the outside wall is \$500.00 for each of 8 vents, a total of \$4,000.00.

Spec. #30-31:9-04 (e) “Aluminum roofing shall be grounded at 3 places per building for protection against lightning. Ground rod will be galvanized pipe with a minimum diameter of $\frac{1}{2}$ ” aluminum rod or pipe not acceptable. Conductor shall be aluminum with #6 minimum wire size. Clamps used for connections shall be aluminum or galvanized metal.” The cost of grounding aluminum roofing at 3 places on each of 4 buildings is \$3,000.00.

v. Specification #39:12-09 (b) “Linen closets fitted with six (6) spruce or hemlock shelves.” There are only 4 shelves in each linen closet, shorting the owners the cost of building additional shelves and the furnishing of 1,040 lineal feet of shelf material. The cost of material and labor to install 6 shelves in 272 linen closets is \$7,500.00.

w. Specification #44:14-10 “Lettering: (a) Black paint $1\frac{1}{2}$ ” letter. (b) On doors to each space hereafter noted. (c) Laundry. (d) Locker and garage numbered.” The contractors failed, neg-

lected and refused to do any of said lettering as specified and did no lettering whatsoever on any part thereof. The cost of metal numbers and installation of same is \$1,000.00.

x. Specification #49:16-09 (f) "I Doors (Metal fire doors in Basement Stair Opening) 15"x31½" metal bevelled or round-edged push plate on stair side; with 8"x2" cast iron door pull on reverse side. 1½ paid steel butts." 32 doors have no such hardware, except substituted butts. The cost of butts is \$72.00; push plates, \$280.00, labor for installation \$500.00. Total cost \$852.00.

y. Specification #49:16-12 "Closers: (a) A-B-I doors shall be equipped with two (2) speed door closers of the rotary piston or ratchet and pinion type of required size to adequately handle doors. Noiseless in operation. Provided with soffit brackets where side jamb clearance is restricted." The contractor violated this provision, which shorted the cross-complainants herein by installing door closers only on front and rear outside doors and not on "B" and "I" doors—shorting the owners 392 doors of the closers above provided. The cost of 392 door closers @ \$32.50 each is \$12,740.00; labor \$2,000.00; total cost \$14,740.00.

z. Specification #50:16-14 "Rail Brackets: (a) Furnish two inch '2' wrought steel plated brackets for wall hand rail all stairs. Two to each stair run." Contractors failed, refused and neglected to furnish

any and all of such rail brackets. The cost of installing wall brackets, \$350.00.

aa. Specification #50:16-15 "Card Plates: (a) Furnish $1\frac{1}{8}$ "x $2\frac{1}{8}$ " pressed steel plated card plates for each apartment entrance door." Said Contractor failed, refused and neglected to furnish any such card plates on 272 apartment doors. The cost of 272 card plates and installation thereof is \$277.20.

bb. Specification #50:16-16 "Numerals-Letters: (a) One inch (1") pressed steel plated numerals and/or letters at each apartment entrance door and at each building entrance." The Contractor failed, refused and neglected to install numerals on the 272 apartment doors. The cost of the apartment numbers is included in "w" above.

cc. Specification #50:16-18 "Hooks (a) Heavy steel wire coat hooks. Six (6) to each closet." The Contractor failed, refused and neglected to furnish 2,640 hooks, thereby shorting the owners. To furnish hooks for clothes closets in 272 closets and install the same is \$570.00.

dd. Specification #53:17-10 "Fire Extinguishers (a) Contractors agreed and became obligated to furnish one (1) each in every stairwell and one (1) each in each boiler room, $2\frac{1}{2}$ gallon soda and acid fire extinguishers approved by Underwriters, labeled for class A-1 fires, to be hung on brackets with upper rim 5 feet from the floor." Contractors failed, refused and neglected to install such extinguishers, thereby shorting the owners 36 fire extin-

guishers. The cost of 36 fire extinguishers @ \$34.00 each is \$1,224.00 and the labor for installing holders is \$230.00. Total cost, \$1,454.00.

ee. Plan No. 1 shows two water wells. Only one (1) well has been provided. The cost of drilling a well 306 ft. with 8-inch casing; 51 feet with 6-inch casing; 40 ft. of 4-inch standpipe in casing is \$15,000.00.

ff. M.P.R. #17:1117-A-B "General." Where the location of the property and the type of living units indicate that children will occupy the living units, equipment and play space, adequate area and suitable location shall be provided.

For properties having a large number of living units, generally provided enclosed children's playgrounds, usually are located to be easily accessible from the living units without encountering traffic hazards, or (2), located in rear areas, at the end of buildings, or in other locations where they will not impair views from or use of the living units, (3) adequate for the expected need, generally at least 2,500 sq. feet per 100 living units, and (4) provided with durable equipment of proper sizes for both preschool and school children. Equipment shall generally be arranged to provide separation of preschool children from older children. The following equipment, or its equivalent shall be provided for each 100 living units served:

2 benches about 6 feet long for adults.

1 slide.

- 1 small bench for children.
- 1 sand box of at least 100 sq. ft. area.
- 2 swings and 1 teeter for preschool children.
- 2 swings and 1 teeter for school children.

The contractors failed to establish any play yards and made no provision for furnishing equipment therefor. The play areas should have been enclosed and should provide 3 each of the above listed appurtenances. See M.P.R. #73:1914 (a). The contract and specifications further provided for the contractor to finish and build fences and free-standing walls. Fences and free-standing walls shall be installed along property boundary lines, around laundry yards, refuse collection points, playgrounds and in other locations where necessary for protective or screening purposes. They shall be appropriately designed for the function intended and shall be substantially constructed to withstand conditions of soil, weather and use. Enclosures for laundry drying yards shall be approximately 6 feet high. Enclosures for playgrounds shall be approximately 3½ feet high. None of these were installed by the contractors and none were even furnished. The cost of grading, filling, enclosing, making sand boxes, swings, benches, slides and teeters for three playgrounds is \$5,000.00; that of fencing and installation of three playgrounds is \$6,800.00, a total cost of \$11,800.00.

gg. M.P.R. #69:1901-B. "Grading and Drainage. Grading and drainage shall be performed so

that water will drain away from the buildings on all sides and off the site in a manner which will provide reasonable freedom from erosion. Construction, such as walks, driveways and retaining walls shall be installed so that they will not interfere with drainage." None of this was furnished, performed or done by the contractors. The cost of drainage is \$20,000.00; raising sidewalks to grade, \$14,928.00; putting on topsoil, \$11,900.00; labor, \$15,000.00, a total cost of \$61,828.00.

hh. M.P.R. #71:1907-A-B "General. Catch basins, manholes, drainpipes, headwalls, etc., shall be installed and connected with proper outlets where necessary to provide adequate run-off of storm water and to protect against erosion or other damage by surface water or ground water. Outlets shall be approved by the owners of the properties affected and local authorities having jurisdiction." None of this was done by the contractors. This cost is included in "gg" above.

ii. The specifications provided that the contractor would "at all locations where surface water pockets, install catch basins and properly connect them to adequate and positive means of water disposal." This cost is included in "gg" above.

jj. M.P.R. #72:1911—The contractor was required to construct sidewalks of Portland cement or other durable hard-surface with sufficient slope to provide immediate disposal of surface water off the walks. The said walks were not to be left so as to

act as drainage channels. The location, width, alignment and gradient, were to be constructed in accordance with the plans and specifications. None of this was done by the contractors. This cost is included in "gg" above.

kk. M.P.R. #74:1916-B-C "Finish Grade Elevations Around Buildings. Finish grade elevations around buildings shall provide continuous slopes away from the foundation walls. Where any slope away from a building meets a slope toward a building, the bottom of the swale or valley formed by the two slopes shall be at least 1 foot below the finish grade elevations at the walls, shall be pitched to provide surface water runoff and, except as prohibited by nearness of lot lines, shall be at least 10 feet away from the foundation walls." The contractors did not comply with this specification. This cost is included in "gg" above.

ll. The specifications required all unpaved areas of the finished grade elevations to provide for continuous slope off at least 6 inches on 25 feet (2% gradient) to lower elevations off the lot, or to drainage structures on the lot. Where catch basins or inlets are installed, the finish grade elevations of adjoining areas shall provide for emergency surface overflow without flooding against the buildings. None of this was complied with by the contractors. This cost is included in "gg" above.

mm. The contractors did no grading of the premises and when they left the premises, they left it in

such condition that from 1 to 3 inches of water was standing on the greatest portion of the sidewalks and driveways to such an extent that tenants or other persons could not get into the apartments without having boots on or wading through water to the entrance. This cost is included in "gg" above.

nn. According to the terms of the specifications, there are four (4) boiler rooms in the project and each was to include a concrete sump constructed so that any water getting on the floor of the boiler room would drain into said sumps. Contractors did not arrange the sumps to carry this water and the water that gets on the floors from any source must be swept into crevices which have had to be dug in the concrete floor for drainage. The cost to put in drainage sumps is \$6,000.00.

oo. The wardrobe doors have not been installed, as provided for in the plans and specifications. Some rough substitutes were made and installed which were patched up. The rough openings built by the contractors were apparently too large for the small trim around the same and would not cover the ends of the plaster board, creating a very unsightly and unfinished condition, and several of the outside door jambs were left with cracks between the wood and the concrete.

The concrete drives and curbs are uneven, crooked and "pock-marked" and were left in this unfinished condition.

The plasterboard in the garages does not extend to the floors, resulting in large cracks or openings around the floors to the extent of being $2\frac{1}{2}$ " high.

1. The cost to put the wardrobe doors in condition specified in the contract is \$5,000.00.

2. The cost to finish drives and curbs is \$3,500.00.

pp. The contractors failed to comply with Specification #37:11-07 "Siding in the following manner, to wit: The specifications called for $\frac{3}{8}$ " waterproof plywood exterior type, Grade A-C with ship-lapped joints. All joints to be bedded in thick lead and oil paste. Attached with 6d hot-dipped galvanized nails not over 12" apart." The contractors evaded the terms of this specification and did not shiplap the joints, but made butt joints; did not fill the joints with thick lead and oil paste, did not nail them with 6d hot-dipped galvanized nails, but used ordinary steel box nails which has resulted in rusting and they will soon be rusted out. On Building No. 4, the nails were 6d box nails and on the others 4d box steel nails. All the nails are rusted the full thickness of the siding. The wood strips covering the joints have all come loose and are crooked. The vertical joints are opening up and, for a distance of about 40 feet on Building No. 2, the plywood has buckled and has opened up the joints in places at least 3 inches from the building. In many other places the siding is bulging out.

The cost to replace the siding, according to the plans and specifications, is \$300,000.00.

qq. The contractors did not comply with the specifications in flashing over the garage doors. The flashing, as used, has been spliced in many places, amounting to 126 splices out of 130 openings and is of little or no use to the building, and will have to be removed and replaced at the additional cost to the owners, when it is clearly a shortage of the contractors. The cost to remove and replace the flashings is \$2,000.00.

rr. Specification #16:3-04 "Grass: (a) Lawn areas of natural grade shall be plowed, harrowed and dragged. Stones of one inch (1") diameter, or more, shall be removed from the surface of all lawn areas. All lawn areas shall be brought to a smooth, even surface and to established grades shown, with not less than four inches (4") of topsoil thereon." This was not complied with at all and no effort was made by the contractors to do so. There are rocks up to 4" in diameter on the surface of the ground of "lawn," and the soil is clay and/or sand. The cost to prepare the plot, sow and cultivate the grass lawn is \$5,000.00.

ss. M.P.R. #61:1703-B 5.d. "Each public stairway and each public hallway shall be provided with not less than one outlet." There are no outlets in the halls, except in Building No. 3 which the manager installed. The contractors did not comply with this section of the specifications at all. The cost to install outlets, per the plans and specifications, is \$3,000.00.

tt. The bathrooms are improperly finished, the plasterboard in many of them does not fit the bathtub, leaving large, unsightly cracks showing, and many nails are popping out of the plasterboard that were not driven in far enough to spackle sufficiently. The cost to finish the bathrooms, per the plans and specifications, is \$100,000.00.

There are 28 reinforced concrete firewalls in the project, with openings through them in the basements. On both sides of these openings there are fire doors. Over the top of the fire doors there are several heating and electrical pipes on the ceiling that pass through this wall. The voids between these pipes were never filled with mortar or fireproof material and are a fire hazard of the worst kind, and the cost of remedying this fire menace will be \$20,000.00.

uu. The contractors left many exposed and crude wood surfaces in the buildings which were not painted and finished in any way. The estimated cost to eliminate unsightly unfinished and exposed wood surfaces is \$3,000.00.

vv. The contractors defectively installed on front of buildings Nos. 1 and 2, dirt grade against the plywood on the buildings for a distance of about 47 feet, and there is dirt thrown up against this as high as 10 inches, in violation of the plans and specifications of this contract which require that there be a minimum of 6" of concrete above all dirt grade.

The cost to comply with the plans and specifications regarding fill against plywood is \$10,000.00.

ww. The contractors constructed Buildings Nos. 1 and 2 in places other than the specifications and plans provided, and too close to the property line thereof. The damage on account of placing Buildings Nos. 1 and 2 in the wrong place amounts to \$60,000.00.

xx. Plan No. 9 provides for apartment entrance doors to be S.C. (self-closing). The contractors did not so install said doors and did not provide closers therefor, and did not install the doors in such a manner that closers can be properly used as provided in the plans and specifications. The cost of installing door closers is included in "y" above.

yy. The contractors are not to be relieved from their liabilities by reason of the approval of the FHA Minimum Requirements, but must all be approved by the owners, which has never been done in this matter, all of which is called for in the contract, plans and specifications.

zz. The contractors did not comply with specification #29:8-06 (c) "Vent Ducts: which provided that electric dryers in laundries were to be vented through walls. The contractors, for the purpose of saving money and shorting the owners, vented these dryers into the garages, thereby putting moisture into the garages and on the cars, causing condensation in Summer and freezing in Winter.

aaa. The contractors failed to comply with Plan No. 2, which shows the dimensions of side and rear driveways to be 30 feet and 18 feet respectively. There is only one driveway of 30 feet in width and all the others are narrower than provided by the specifications, skimpy and improperly built. The cost to construct driveways, according to the plans and specifications, is \$25,000.00.

bbb. The contractors failed to comply with Plans Nos. 7 and 8, which require all exterior gables to be finished with 1"x8" joint cedar siding. The contractors did not furnish or use said siding at all, but substituted plywood laid with butt joints and no moulding over the joints. The same is warping and decaying and will have to be replaced by cedar siding. The cost to replace gable covering is \$20,000.00.

ccc. The contractors failed to complete the casings of the windows and doors and other openings throughout the entire 272 apartments. They have left openings uncased, leaving cracks between the plasterboard joints. The casings and the doors are cracking and crazing vertically on both sides and the veneer covering is loose at edges, due to the fact that the contractors used second-grade doors when, by the terms of the contract and plans and specifications, they were required to use first grade. This applies to all of the doors and windows and casings in the entire apartment buildings. According to the plans and specifications, approximately 1,304 win-

dows were to be screened. No screens were put on any windows.

Cost of 272 doors and casings meeting specifications	\$19,460.00
Labor installing 272 doors and casings	12,423.00
Cost 1,304 windows	50,000.00
Labor replacing windows and casings.	50,000.00
Cost 1,800 screens and labor installing same	8,000.00
<hr/>	
Total	\$139,883.00

ddd. The contractors failed to finish up the kitchens in all of the apartments, according to the plans and specifications, which provided that $\frac{1}{8}$ " linoleum top and back (splash) was to be furnished 18" high, and most of the kitchens were finished with the back only $9\frac{1}{2}$ to 10" high.

The contractors failed to lay greaseproof tile in the kitchens of 250 apartments, according to the plans and specifications, and thereby shorted the owners of 15,000 sq. ft. of greaseproof tile.

The cost of finishing the kitchens by installation of specified linoleum on top and back (splash) of cabinets and sinks is \$16,000.00, and the cost of removing the present tile and laying 15,000 sq. feet of greaseproof tile is \$15,000.00.

eee. The contractors failed to comply with the specifications in the following items, to wit:

In addition, in each building, it has been found that no trenches in the floating slabs, as shown on

the drawings, to accommodate sewage outflow were installed, or provision made therefor. As a consequence, when installations were accomplished, to provide outflow, the essential re-enforcement steel in the slabs, such as was installed, was out and the concrete in the trenches was then provided after the slab was poured, laid and set, was removed, and in many instances, re-enforcement steel was not placed properly as called for by the plans, specifications and drawings, so as to provide prescribed re-enforcement; thus, the methods employed in construction destroyed the design characteristics of the floating slab foundation which produced and resulted in great settlement and cracking of the floating slab foundations, produced a warping and an uneven settlement of all the buildings. Damage by settling due to the necessity of cutting floating slabs of re-enforced concrete is \$100,000.00.

IV.

Cross-complainants allege that by reason of the breaches of the contract, plans and specifications above enumerated, these cross-complainants have been damaged in the sum of \$1,214,431.00.

V.

These cross-complainants further allege that by reason of the contractors having failed to comply with the terms of the said contract, plans and specifications, these cross-complainants have spent unduly in doing that which the contractors were required to do under the terms of the contract, large sums of

money, to wit: the sum of \$141,612.15, all of which was the result of the wrongful acts and deeds of the contractors, and that these cross-complainants are entitled to recover of and from the contractors, this additional sum of money, to wit: \$141,612.15.

Second Cause of Action

I.

These cross-complainants further allege that on or about the 29th day of April, 1952, one of the defendants, Cliff Mortensen, caused to be made, executed and delivered, an affidavit that was false and known by him to be false at the time, which affidavit was delivered to the National Bank of Commerce, in Seattle, Washington, for the purpose of drawing down funds there belonging to these cross-complainants to the extent of \$311,687.68, and by making said false affidavit, the said Cliff Mortensen, acting for and on behalf of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, obtained, took, kept, and now holds a said sum of money which really belongs to these cross-complainants.

II.

And on or about the 7th day of May, 1952, the said Cliff Mortensen made a false affidavit, knowing the same to be false at the time he made it; caused it to be delivered and filed with a bank in Seattle, and by reason thereof was able to wrongfully draw down and take money belonging to these cross-complainants to the extent of \$10,125.49,

no part of which was due Nelse Mortensen, Cliff Mortensen and Frank V. Henderson.

III.

Thereafter, and sometime after the 9th day of October, 1953, the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson fraudulently, and through false representation did draw from a bank in Seattle \$8,800.00, lawful money of these cross-complainants, which money represented the contract price due for landscaping of said apartments when, in truth and in fact, each of the parties, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, knew that the landscaping had not been done and no part thereof had been done, and therefore wrongfully and fraudulently obtained \$8,800.00 from the cross-complainants, which money belonged to them; therefore wrongfully obtaining and are holding \$330,613.17 which belongs to these cross-complainants; and that the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, being justly indebted to these cross-complainants for the said sum, should be required to account therefor.

IV.

That by the terms and provisions of the said contract, the contractors, Nelse Mortensen-Alaska, Inc., undertook to provide the owner with the assurance of the completion of the contract in the form of an indemnity agreement in the amount of Two Hundred Ninety-five Thousand Nine Hundred Twenty

(\$295,920.00) Dollars, and the payment of the following items in connection with the project:

- (a) Interest on the mortgage loan during construction;
- (b) Insurance required during construction;
- (c) FHA mortgagee's insurance premiums;
- (d) FHA examination fee;
- (e) FHA inspection fee;
- (f) Financing expense;
- (g) Title and recording expense,

and Nelse Mortensen-Alaska, Inc., further agreed in the event the owner paid any or part of the above items (a) to (g), inclusive, the owner would receive a corresponding credit on the contract price.

V.

That the defendants refused and neglected to pay during the construction work on said housing project, although required to do so by the contract herein referred to, the following items, to wit: Interest on mortgage due January 1, 1952, in the amount of Nine Thousand Seventy-five and 26/100 (\$9,075.26) Dollars and thirty (30) days delinquent interest in the amount of Thirty and 25/100 (\$30.25) Dollars; interest on Mortgage due February 1, 1952, Nine Thousand One Hundred Ninety-four and 76/100 (\$9,194.76) Dollars, real estate taxes levied August 1, 1951, Thirty-one Thousand Six Hundred Twelve (\$31,612.00) Dollars; that due to the neg-

lect, failure and refusal of the defendants to pay said items, cross-complainants herein made the payments. That repeated demands have been made on plaintiffs herein to reimburse cross-complainants for said payments, but said plaintiffs have refused and neglected to so reimburse cross-complainants contrary to the terms of the contract herein referred to, with interest at six per cent (6%) per annum on the various amounts hereinbefore mentioned.

Wherefore, these cross-complainants pray judgment against the above-named plaintiffs, to wit: Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, as follows, to wit:

1. On cross-complainants' First Cause of Action, the sum of \$1,356,043.15.

2. On cross-complainants' Second Cause of Action, the sum of \$380,525.44.

3. And the reasonable sum for cross-complainants' attorney fees, together with the costs of disbursement incurred herein, and for such other and further relief as to the Court seems just and equitable.

WARREN A. TAYLOR, and
BELL & SANDERS,

By /s/ WARREN A. TAYLOR,
Of Cross-Complainants'
Attorneys.

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath, deposes and says: That he is one of the defendants and cross-complainants in the above-entitled action; that he has read the foregoing Cross-Complaint, knows the contents thereof, and that the same are true as he verily believes.

/s/ CASH COLE.

Subscribed and Sworn to before me this 22nd day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

Lodged February 23, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE JUDGMENT AND IN OPPO-
SITION TO MOTION FOR APPOINTMENT
OF RECEIVER

United States of America,
Territory of Alaska—ss.

Tom Cole, being first duly sworn, upon his oath deposes and says:

That since April, 1953, I have worked for Fairview Development, Inc., in its apartment project known as Fairview Manor, at Fairbanks, Alaska, and since June, 1953, have been in charge of maintenance.

During the period since April, 1953, improvements have been made in the heating and water distribution systems which have materially reduced the cost of operation.

All of these improvements have consisted of correcting the errors of the general contractors, and their sub-contractor, A. G. Rushlight, who did the mechanical work on the project. These errors existed at the time the contractors secured their final payment, and about \$141,000.00 was spent out of the rentals making these corrections which were the prime responsibility of the contractors.

The expenditure of these funds has resulted in a saving of over \$15,000.00 per year in electricity, water, heat and labor.

That when the manager, Cash Cole, took possession of said Fairview Manor, it was found that the contractors had done such a poor job that it was with difficulty that the place could be kept open. Rental money had to be ploughed into the project to keep going, and to do things that the contractors had failed to do under their contract.

Affiant has read the affidavit of Cliff Mortensen, and in reference to statements contained therein, denies that affiant was present at any conference re-

garding the settlement of the above-entitled cause after the 6th day of October, 1953, and had no knowledge of what was transpiring, as Dick Rushlight was doing all the negotiating with the attorneys for plaintiff, as a purported friend of Cash Cole.

That at the time affiant was conversant with the income of Fairview Manor, and the cost of operation of the same, and affiant advised Dick Rushlight, after the negotiations were completed, that it was an utter impossibility to purchase Mortensens', Henderson's and Nowell's stock on the terms set forth in the agreements, and also pay Rushlight \$25,000.00, according to the terms of a demand note Rushlight had induced Cash Cole to sign, but Rushlight ignored the said information and had Cash Cole sign the said agreements and note. Affiant also informed Mr. Jaureguy, one of Cash Cole's attorneys, that the terms of the agreement were impossible of fulfillment, but no attempt was made to prevent Cash Cole from signing. At the time the negotiations were going on, no persons were allowed to visit Cash Cole, who was confined to bed with a severe heart attack and was taking drugs which dilated his eyes to such an extent that he could not read, and had to depend upon what was told him by Dick Rushlight. Affiant or Mrs. Ruth Cole were not present at the time of the signing of the said agreements and note.

That it was several days after the agreements and note were signed before Cash Cole was able to read

the same, and Cash Cole was very surprised to ascertain that Rushlight had secured his signature to said note for \$25,000.00, when no money was owed by Cole to Rushlight.

That affiant denies that Mr. Jaureguy and Dick Rushlight did confer with Cash Cole from day to day from the date of Cash Cole's heart attack until the agreements and note were signed. That for three or four days no one was admitted to see Cash Cole, except affiant, Mrs. Cole and Dr. Ribar, and at no time during this period was any business discussed, as Cash Cole was an extremely sick man, and was not physically or mentally able to do so. Affiant was advised by Dr. Ribar to this effect, and it was also very apparent to affiant.

When the Stipulation was signed, the stock was supposed to be turned over to Cash Cole, as the President of Fairview Development, Inc., but although repeated demands have been made for said stock, plaintiffs have protested the delivery of said stock to Cash Cole, which stock has heretofore been held in escrow by Roy Sumpter, of the Washington Mortgage Company, Central Building, Seattle, Washington. That when Cash Cole requested said Roy Sumpter to deliver the stock to him, Josef Diamond, attorney for the plaintiffs, objected, although the escrow under which said stock was held had ended, and Cash Cole's stock should have been delivered to him.

Furthermore, Cash Cole was not bound to deliver the stock to plaintiffs, when he ascertained that he

had been induced to sign the instruments and note while unable to comprehend the import of said documents.

That Cliff Mortensen and Frank Henderson have not endorsed over their stock in Fairview Development, Inc., to Cole, as required by said instruments.

That as soon as Cash Cole was able to read and understand the nature of the instruments he had signed, and was aware that, by the provisions of the same, he had virtually conveyed all his interest in Fairview Development, Inc., to the plaintiffs without any consideration whatsoever.

When Rushlight and Mortensen settled their suit and Rushlight was paid \$125,000.00 by Mortensen, that settled a matter strictly between them and was of no concern to Fairview Development, Inc.

Fairview Development, Inc., did not owe Mortensen and Henderson any money, but to the contrary, Mortensens and Henderson, by reason of not finishing the project for which they received the sum of \$3,080,000.00, became indebted to Fairview Development, Inc., in the sum of \$1,356,043.15 for shortages in the building contract and the sum of \$380,525.44, which represents money drawn against the contract for work and materials which was not utilized on the buildings, as more fully shown by the allegations of defendants' Cross-Complaint lodged herein.

In response to Cliff Mortensen's statement that he and Henderson were unaware of the financial condition of the Fairview Development, Inc., affiant

states that Cliff Mortensen hired a C.P.A. in 1952, who audited the books and rendered a report to Mortensen and Henderson. That Fairview Development, Inc., had to pay out several thousand dollars to the C.P.A. hired by Mortensen and Henderson. That Mortensen employed a bookkeeper for Fairview Development, Inc., who turned up \$2,700.00 short in her accounts.

Affiant further states that neither he nor Mrs. Cash Cole had any appreciable knowledge of the contents of the instruments signed by Cash Cole, and further states that Cash Cole was unable to read the said instruments for a week after the execution of the same. That no person was ever in the bedroom of Cash Cole long enough to have read the Stipulations, agreements and note to him.

In reference to the affidavit of Frank V. Henderson, affiant denies that any exorbitant salaries were paid to anyone, nor were apartments furnished free to any employee, except as a part of their compensation.

That Henderson is not telling the truth when he states that there was antagonism between Cash Cole and the tenants. The only indications of what might be considered antagonism was that while Cash Cole was in the States on a business trip, the bookkeeper employed by Cliff Mortensen had allowed about 100 tenants to move into the project without signing leases. That upon his return, he went to the tenants regarding their signing leases

and encountered some grumbling on the part of the tenants.

Affiant further states that Frank V. Henderson is indebted to Fairview Manor in the sum of \$2,426.00 for apartment rent while he and Mortensens were constructing Island Homes on Bentley Island. This claim has been placed in the hands of the corporation's attorneys for collection.

As stated before, the faulty construction of Fairview Manor by the plaintiffs and their failure to perform a great deal of the work required by the plans and specifications, and which has been done by the management, has caused the project to have a difficult time paying its way.

The fixed charge, under the mortgage, is \$21,700.00 per month. Out of this, all taxes, insurance and ground rental are paid.

By the expenditure of approximately \$141,000.00 of the rentals, the buildings and equipment were put in condition to reduce overhead costs of operations. Wages were cut \$10,000.00 in 1953; cost of electricity, heat and other facilities was reduced at the rate of approximately \$15,000.00 per year, so that now, with 20% vacancy during the Winter months when costs of operation are highest, the project can maintain its payments on the mortgage, together with interest, insurance, taxes, land rental and all operating costs.

For the first time since the occupancy is Fairview Manor able to operate efficiently and economically.

As one instance of the flagrant disregard of the contractors to abide by the plans and specifications of said project was the fact that the contractors drilled one well, whereas the plans called for two wells. It was found that one well could not supply the 50,000 gallons of water necessary for the 272 apartments and the boilers and laundries, so it was incumbent upon the defendants to drill another well 351 feet at a cost of \$16,000.00. This example can be multiplied many times, and is more fully shown by the Cross-Complaint lodged in this action to which reference is hereby made.

/s/ TOM COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE JUDGMENT AND IN OPPO-
SITION TO MOTION FOR APPOINT-
MENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Ruth Cole, being first duly sworn, upon her oath, deposes and says:

That during the trial of the above-entitled cause in the early part of October, 1953, affiant's husband, Cash Cole, suffered a severe heart attack, which necessitated medical care and complete isolation and rest. This heart attack occurred during the night of October 5, 1953.

That by reason of said heart attack, Dr. Ribar advised complete rest and ordered Mr. Cole not to take further part in the trial of the case, in which he was one of the defendants.

That Mr. Cole was placed in bed and for three or four days the only persons allowed in his bedroom were affiant, Tom Cole, his son, and Dr. Ribar.

About the 7th or 8th of October, 1953, Dick Rushlight, who purported to be a friend of my husband, got into his bedroom and discussed a settlement of the lawsuit which was then on trial, and also negotiated regarding selling his stock in Fairview Development, Inc., to Mortensens or buying their

stock and also buying some stock of Everett Nowell in Fairview Development, Inc.

That affiant or Tom Cole took no part in said negotiations, nor were they present when Rushlight was talking with my husband over a period of several days.

That during the time Rushlight was conferring with my husband, my husband's eyes were in such a condition that he could not see. He was also very weak and was not mentally alert and able to transact business.

Rushlight finally brought several papers into Mr. Cole's bedroom and Mr. Cole signed them, but he did not know what the papers contained for several weeks after they were signed.

That when he was able to read the papers, he was very astonished and angry, as he knew and stated that it would be impossible to make the payments to Mortensens and Nowell, as provided therein. He was further surprised that Rushlight had also had him sign a demand note for \$25,000.00, as he, or Fairview Development, Inc., did not owe Rushlight any money.

That Mr. Cole was a very sick and weak man for several months following the heart attack, and during the past month or so has been confined to his bed for several days at a time.

That affiant believes, and therefore avers, that Cash Cole at the time he signed the stipulation with

Mortensens and Henderson, and the agreement with Nowell, and the demand note to Rushlight, was unable to read, nor was he able to understand and transact any business.

That affiant did not, nor did Tom Cole, participate in the negotiations which led up to the execution of the documents hereinbefore mentioned.

/s/ RUTH COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE JUDGMENT AND IN OPPOSITION
TO MOTION FOR APPOINTMENT
OF RECEIVER

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath
deposes and says:

That he has read the affidavits of Everett Nowell,
Cliff Mortensen, Frank V. Henderson, Josef Diamond
and Earl Zinn in opposition to the defendants' Motion
to set aside and vacate the Stipulation and Judgment
based thereon, and in reply thereto states as follows:

In reference to the affidavit of Cliff Mortensen,
affiant denies that there was any deadlock in the
management of the properties of the corporation,
Fairview Development, Inc.; and denies that at any
time had there been any mismanagement of the
properties of the corporation; nor was there any
improper disposition of the funds and assets
thereof, and alleges that the properties were well
managed by affiant.

Affiant admits that at the time of the trial of said
cause, Cake, Jaureguy and Hardy, attorneys at law,
of Portland, Oregon, appeared as attorneys for
affiant. That John E. Hedrick and Stephen J.
Morrissey, of Seattle, Washington, did not appear

in said cause on behalf of this affiant; but did appear as counsel for Everett Nowell. That Hedrick & Morrissey did, at the instance of Everett Nowell, institute an action against Mortensen and Henderson in the U. S. District Court at Seattle, Washington. That affiant was opposed to bringing said action in Seattle. Affiant felt that the proper place to bring an action against the Mortensens and Henderson was in this Court, where the property is located.

That an action brought on a proposed cross-complaint in the cause No. 7298 will fully adjudicate the matters in dispute herein. That an investigation by an architect disclosed that the plaintiffs stole in excess of One Million (\$1,000,000.00) Dollars in the construction of Fairview Manor at Fairbanks, Alaska, by skimping on materials and by failing to do the work specified in the plans and specifications of said project, and by false and fraudulent affidavits that the job was completed, did draw the sum of \$311,687.68 from the National Bank of Commerce at Seattle, Washington, knowing at the time that said affidavit was false, and knowing that the project was not completed.

That the plaintiff, in May, 1952, drew the further sum of \$10,125.49, money of defendant corporation, Fairview Development, Inc., and did, in the month of October, 1953, draw \$8,800.00 from said bank, which said money was to be used for landscaping the grounds surrounding the Fairview Manor. That

no part of the landscaping provided for in the plans was done by plaintiffs.

That by reason of the failure of the plaintiffs to finish the construction of Fairview Manor, and their doing completed work in such an unworkmanlike manner, and with the use of inferior materials, defendant was compelled to use the sum of \$141,000.00 derived from the rentals to complete the building and re-do inferior work of the plaintiffs. That the use of the rent money, as aforesaid, placed the company in a bad financial condition, although by practicing strict economy of operations, the company has been able to meet all of its obligations, including payment of principal and interest on the loan for construction, taxes, ground rent, insurance, etc. That during the present Winter, the vacancies have been from 50 to 71, which reduces the income to a point where income and expenditures are approximately the same.

That affiant has been the manager and part owner of Fairview Manor since the opening of the first building on August 1, 1951. The other three buildings were rented as they were finished, the last building, No. 3, in December, 1951. That so many things were left unfinished, and so many things engineered and done wrong in the boiler rooms that it immediately became a continuous struggle and necessitated the outlay of money to keep the project in operation. The problem was not that of maintenance, but of construction corrections, which necessitated the expenditure of approximately \$141,000.00

to the end of September, 1953. That this is more money than the project could afford, and, as a result thereof, it is without any cash balance. That the examiner for the mortgagee required that the buildings, due to poor construction, be painted on the outside during the summer of 1953, and required numerous other corrections, most of which have been done, with the exception of the exterior painting, which will cost about \$15,000.00. That affiant was unable to do this, as the money had to be spent on more important things, so it remains a requirement for 1954. That there is very little chance of this being accomplished, since the project has been operating during the present Winter with many vacancies. That February 1, 1954, there were 71 vacancies out of 272 apartments in the project.

That notwithstanding the heavy loss of tenants during the present Winter and during the Winter of 1953, the corrections which have been made mechanically and business-wise have made a saving which has permitted affiant to meet all obligations to date, with the exception of a note, payable May 30th, in the amount of \$7,500.00. That, as of February, 1953, the project was obligated for debts amounting to more than \$20,000.00 which were not paid until the middle of the Summer of 1953. During the year of 1953, affiant was able to effect a saving of \$15,000.00 over the operation of 1952, and 1954 should show a greater gain. That the saving in labor costs was over \$10,000.00.

That immediately after construction began, it became apparent that the Mortensen interests viewed the project from the angle of getting all the money possible from construction of the project, regardless of the quality or its completion. As an owner, insisting upon compliance with the plans and specifications, affiant became very unpopular with the Mortensens, and their continuous effort was to silence affiant in any way possible. They watched closely improvements which were made from the rent earnings, and when the time arrived that the continued improvements had reduced the cost of expenditures and operations to an amount that the project could carry and show a profit, the Mortensens stepped in and requested that a receiver be appointed on the grounds that the project was being mismanaged and the money dissipated, knowing full well that all that was needed was the elapse of a few months' time for comparison to show that the money expended in changes and improvements had been well and judiciously spent. All during the year of 1953 there had been a saving in operation, but the big saving showed in the months of October, November and December, as September had seen practically all of the needed changes completed on operation and, as has been stated, a saving of over \$15,000.00 was effected.

That the Mortensens collected every cent of the commitment grant of \$3,080,000.00, and they now come forward with an effort to gain complete con-

trol of the project; drain whatever more they are able to out of rents, and, most of all, remove affiant from the management and access to the books of account, in order that all their shortcomings as contractors and builders of Fairview Manor cannot be made a matter of public record.

That the Mortensens and Henderson shorted the project in excess of \$1,000,000.00, as shown by the Cross-Complaint lodged herein, and now want to take over the interest of affiant by means of an instrument signed by affiant while extremely ill with a heart attack, and while he was taking medicine that dilated his eyes to a point where he was unable to read. That the man he trusted, Rushlight, in addition to having affiant sign away his rights to Fairview Development, Inc., also had him sign a demand note, payable to Rushlight, in the sum of \$25,000.00, and did also have him sign an agreement to purchase the interest of Everett Nowell in Fairview Development, Inc.

It was evident to affiant when he had regained his strength to read and understand the nature and import of the documents prepared by the plaintiffs' attorneys and which was signed by affiant through the representations of Rushlight, that the plaintiffs had concocted a scheme to secure not only the profit on the contract of construction, but also over One Million (\$1,000,000.00) Dollars by failing to do the work, and use the materials provided for in the plans and specifications, and then to secure the ownership of Fairview Manor so that they could

eliminate affiant, secure possession of the books and property and prevent an investigation of the illegal and fraudulent practices of the plaintiffs, as more fully set forth herein.

On page 2 of Everett Nowell's affidavit, last part of Paragraph 1, Nowell states: "However, the testimony showed certain activities by Cash Cole in relation to his management of Fairview Development, Inc., which was not for the benefit of Fairview Development, Inc., and of which your affiant had no knowledge prior thereto." This statement is untrue. There were three things brought out in the testimony. One was that purchases had been made through Fairview Manor for auto parts for Tom Cole. This procedure did not require a meeting of the Board of Directors, and it has been done at various other times—simply an accommodation to take advantage of securing wholesale prices for people who worked for, or were interested in, Fairview Development, Inc., and which has been paid.

Item 2, which was severely criticized by Attorney Diamond, was the building of a bar by Everett Nowell for his apartment, along with all other furnishings that were charged to Fairview Manor, and the payment by Cash Cole as manager of Fairview Manor of \$1,000.00 per month to Everett Nowell as his 50% share of the management agreement with Fairview Manor, although Nowell was, at the time, and almost continuously from the time he had received the \$1,000.00 per month up until December, 1952, totalling in excess of \$20,000.00, on the pay-

roll of Alaska Freight Lines, and used the apartment to house his numerous friends, some of whom occupied the apartment without pay for as long as two months at a time. Therefore, the affidavit of Nowell is untrue, and the things for which the criticism was charged were certainly of his knowledge, and without regard for the position in which it placed affiant, although affiant supported him loyally, feeling that he was a friend and close business associate.

On page 3, Paragraph 2 of Everett Nowell's affidavit, his statement that Nowell's attorneys represented Nowell and Cole up until the case was filed against affiant is not true. Affiant could never agree with Morrissey in the manner in which affiant was advised by his firm. There were interests of the corporation which affiant felt should be taken to Court, but there was never anything beyond conferences, with no results. When the time arrived for the transfer of the mortgage to the final mortgagee there were several liens against the project which stopped the transfer. In order to remedy this situation, Josef Diamond produced an agreement to release the final 10% payment which FHA requires by law shall be held in escrow until all bills are paid and the property is free and clear, and completed according to plans and specifications. Affiant objected to such procedure, because the project had not been completed according to plans and specifications and there were several liens against the project. Notwithstanding this situation,

affiant and associates were advised by Morrissey to sign the release, with the verbal understanding that the money would be held by the bank as part security for guarantee of a \$470,000.00 total of liens, along with a note for the remaining amount being put up by the Mortensens. This was the only way the National Bank of Commerce could be relieved of the \$3,080,000.00 loan before the Kansas City Title and Trust Company would guarantee the title. The penalty against the project for helping to clear the liens was a \$6,000.00 charge by the agent of the Kansas City Title and Trust Company for his services for three days.

This transaction was completed about April 30, 1953, and within a few days affiant was informed by his auditor that the money had been released direct to the Mortensen Company, and further inquiry disclosed that in order to obtain the release of these funds, a clearance had to be made by Fairview Development, Inc., and the files of FHA show that upon a request made on FHA form by the National Bank of Commerce and signed by Cliff Mortensen as President of the corporation, the clearance had been given by FHA. Thus Fairview was left without any guarantee of the removal of the liens or the completion of the project according to plans and specifications.

It was during the trial that affiant heard Mr. Nowell's letter of condemnation of affiant read, and it then made clear to affiant that Nowell's responsibilities as a director in Bayview Realty and

Fairview Development, Inc., were secondary to his personal affairs, and had been from the beginning. From the time that Fairview Manor had a drop in the number of tenants to the point where he could not be paid \$1,000.00 per month, he immediately made it clear that whatever he could do to get the most money from the project for the interest he held would be done, regardless of policy, friendship or anything else, and the course decided upon by Nowell and his attorneys gave no consideration at all to affiant.

Referring to page 4, Paragraph 2 of Nowell's affidavit, affiant fully appreciated, after recovering sufficiently from his illness to be able to read and digest the agreement which were made, that if the Fairview Development, Inc., was to remain solvent it would have to be done without any agreement from the Mortensens and Nowell, who clearly showed by his letter that he was going along with the Mortensens, and just marking time, with the aid of his attorneys to keep affiant from bringing any action against them. Affiant was never represented by Nowell's attorneys, nor was Fairview Development, Inc., to any advantage, although they collected \$9,000.00, for which Fairview Development, Inc., has never received a statement.

In reference to page 4, Paragraph 3 of Nowell's affidavit, Nowell has not carried out the requirements and conditions of the contracts and the Stipulation dated October 9. Affiant has not received Nowell's stock in Fairview Manor, nor has

Nowell turned over the records of transactions which he and Kenneth J. Kadow (presently under investigation by the McCarthy Committee) handled for the sale of two houses for Bayview Realty, Inc. The only thing affiant has is a memorandum sheet of paper showing that Nowell and Kadow disposed of the houses for approximately \$27,500.00. This shows a loss of \$11,000.00 when subtracted from the bills outstanding against the operation, and affiant has never been able to secure any other information concerning the handling of over \$30,000.00 other than being informed that the deal balanced out approximately even. Kadow was not a stockholder in Bayview Realty, nor was he a director in the company, and the same is true of West Juneau and Gastineau Utility. Kadow had no stock in either one of these companies. The statement that affiant has taken over the assets of Bayview Realty, Inc., and exercised them to his own designs and purposes is utterly false. There were no assets, but to the contrary, a very substantial loss. Nowell appropriated approximately \$3,000.00 from cash belonging to Bayview Realty, Inc., and applied it on payment of a Cadillac automobile.

It is true that Tom Cole and Mrs. Cash Cole were elected to the Board of Directors of Fairview Development, Inc. When Nowell and the Mortensens withdrew as directors, as per the Stipulation, there was no legal way for Fairview Development, Inc.,

to function unless it elected additional persons to make up a Board of Directors.

Referring to page 5, Paragraph 1, which states that Nowell dismissed a case in excess of \$690,000.00 for damages against the Mortensens, affiant gathered all the evidence upon which the case was based and attempted to have Nowell's attorneys file the case many months prior to when it was filed, but without avail. Suddenly, without the knowledge of affiant, or his consent, the case was filed and verified by Everett Nowell, only a short time before the hearing of affiant's case in Fairbanks. Affiant and Nowell had discussed the case, and affiant was of the opinion that it should not be filed at that time; that it would only create more dissension, and if there was a chance to settle, it should be attempted. It is affiant's conclusion that the case was filed by Everett Nowell solely for his own bargaining benefits.

Affiant was a director in the Gastineau Utility Company, Inc.; Bayview Realty, Inc., and Fairview Development, Inc., as was Everett Nowell, and wishes to state that at no time were his responsibilities as a director and officer of the above-named corporations considered paramount. His judgment and actions were for himself, regardless of the corporation or those in it. As President of Fairview Development, Inc., he knew full well the shortcomings of the Mortensens in the performance of their contract. That Cliff Mortensen signed any and all papers that he saw fit as President, and that Nowell, at no time, did anything to affirm his

right and duty as the President, notwithstanding the fact that affiant protested such procedure to him in front of his attorneys. Until the last, Cliff Mortensen signed his name as President of the corporation to the final paper releasing all of Fairview's security money for completion of the contract, yet Nowell, as the regularly elected President of the corporation, did nothing to nullify such action.

In conclusion, affiant wishes to state that, in spite of an average vacancy of 55 tenants per month for the past three months, a saving in operation has been effected, due to the improvements which have been made since the opening of the project until September, 1953, amounting to a sum in excess of \$15,000.00. Each FHA payment, in the sum of \$21,690.16, has been made on its due date. These payments include principal, interest, reserve for mortgage insurance, reserve for fire insurance, reserve for taxes, reserve for ground rent, and reserve for replacements. The only other bills are for salaries and operational expenses which are paid currently each month. In order to meet these bills on time, it has been found necessary to borrow \$7,500.00 which will be paid May 30, 1954. All of the escrow money for the different items enumerated is paid directly by the trustee, the Seattle Trust and Savings Bank.

/s/ CASH COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN SUPPORT
OF MOTION TO SET ASIDE JUDGMENT
AND IN OPPOSITION TO MOTION FOR
APPOINTMENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That in reply to the affidavit of Frank V. Henderson, filed herein, the statements in Paragraph 3 are untrue. Affiant was not consulted about the terms and conditions contained in the stipulation. That it is not true that Rushlight hinged the settlement of his case upon their settlement with Cash Cole. That Rushlight, under the guise of friendship, made an impossible settlement for affiant to

comply with, and it was intended as such, and that Rushlight was informed by Tom Cole that the payments agreed upon to be received by the Mortensens and Nowell could not be met the first of the year. That Nicholas Jaureguay did not work out the settlement. That the agreement, as worked out, secured for Rushlight \$125,000.00, and for \$1,000.00, which was not received by affiant; he was later informed by Rushlight's attorney, a Mr. Hardy in Portland, that affiant sold all interest in Bayview Realty Company, which, in turn, had acquired Mortensen's stock and Nowell's stock; and in addition to acquiring all of Bayview Realty, Inc., for the sum of \$1,000.00, they secured affiant's signature on a promissory demand note from Fairview Development, Inc., for the further sum of \$25,000.00. That Rushlight even agreed to the release to the Mortensens of an escrow sum of \$8,800.00 for landscaping work on the grounds of Fairview Manor, which work has never been done. That consequently, affiant was to be left without a share of stock in either corporation, Bayview Realty, Inc., or Fairview Development, Inc.

In reference to Paragraph 4 of Henderson's affidavit, affiant acknowledges that he has been carrying on the business of Fairview Manor, but it has been done legally and in an organized manner. That Cliff Mortensen and Everett Nowell had withdrawn as directors and Tom Cole and Mrs. Cash Cole were appointed and elected in their place in order that the corporation would be legally qualified to carry

on business. Affiant has not permitted members of his family to occupy apartments other than in line with the work which they performed. The same salaries and procedure have been followed by affiant with members of his family as with other employees, i.e., people employed by the corporation have been paid a salary, plus their apartment. That tenants have not been unduly antagonized, with the exception of those violating rules and regulations. That a good deal of trouble was caused through the failure of the bookkeeper installed in the office of Fairview Manor by the Mortensen group to secure signatures on leases of over one hundred tenants. That insistence on signatures to these leases did cause some controversy.

Referring to Subsection E of Paragraph 4 of Henderson's affidavit, as affiant has already stated, there were no funds with which to pay the Mortensen group on the agreement negotiated by Rushlight. That the initial payment specified in the stipulation would have immediately thrown the project into bankruptcy, and affiant's course, as the manager and a director in Fairview Development, Inc., has been to pay all current bills, including labor, and to meet each monthly payment due the mortgagee. That the funds of the corporation are not being dissipated and squandered. That from the month of November, 1953, through the present date, Fairview Manor has averaged 55 vacancies, and that, notwithstanding this loss of income, every obligation has been met to date, and at the present

date, the only bill that Fairview Development, Inc., owes, other than those which are currently paid each month, is a note for \$7,500.00. That this money was borrowed to meet the current bills and to cover part of the loss incurred by the vacancies. That the rest of the money, amounting to approximately \$15,000.00 has been made up in a saving of labor and operational costs. That a preliminary comparison of the 1953 operational costs over those of 1952 amounts to something over \$15,000.00, which figures are in contrast to the Mortensens' participation in the operation of the corporation by continuously harrassing the management in trying to maintain a normal operation of the project, notwithstanding the fact that the Mortensens, as the contractors and builders of the project had forced Fairview Manor to expend \$141,000.00 in remedying the shortcomings of their work as contractors. That contrary to every statement and action on their part, Fairview Manor is still a corporation which has paid all of its legal and just debts to date.

That a Certified Public Accountant is presently working on the books of account of the corporation and will, within a reasonable length of time, have a full report for inspection by all concerned.

Affiant further states, in reply to the affidavit of Cliff Mortensen, on file herein, that the statement in Paragraph 1 of said affidavit are untrue. That Frank Henderson and Nelse Mortensen are not and have never been directors of Fairview Development,

Inc., as may be verified by the corporation's minute book. That there was not a deadlock in the conduct or management of the affairs of the corporation, due to the failure of the Board of Directors to proceed, nor do the books of the corporation show mismanagement or improper expenditure of funds and dissipation of the assets. That the directors and officers of Fairview Manor were Everett Nowell, President; Cliff Mortensen, Vice President, and Cash Cole, Secretary-Treasurer, who conducted the business of the corporation from its origin under a resolution passed by the Board of Directors, giving full power and authorization for Cash Cole to act as its business manager, and the same Board of Directors, all present, ratified a contract of management for Everett Nowell and Cash Cole. That each of the directors above named held a share of stock.

In reference to Paragraph 2 of the above-mentioned affidavit, affiant further states that an agreement was made that 900 shares of stock should be issued, 450 to the Mortensen group and 450 to Bayview Realty, Inc., and/or Cash Cole and Everett Nowell. Affiant and Nowell received their stock as full payment for furnishing the land and the temporary commitment for the project. The Mortensens were to receive their stock for fulfilling the terms of their agreement and completion of the contract according to the plans and specifications. This stock was placed in escrow, to be delivered as stated when the project was successfully completed;

and to date, the contract has not been completed, as set forth in the Cross-Complaint on file herein.

The statement that the Mortensens had 50% of the voting stock is untrue. Each director voted one share, and the continuous attempt of the Mortensens to insist that their 450 shares of escrow stock had voting rights was both untrue and illegal, as the Territorial law clearly defines how a Board of Directors shall vote. Bayview Realty, Inc., and/or Cash Cole and Everett Nowell have performed their part of the agreement fully and were entitled to the 450 shares of stock, yet the Mortensens, with their corps of attorneys, would never agree to release it, and, as cited, have never completed the contract. Mortensens' attorneys have kept the holder of the escrow stock from ever delivering said stock, thereby failing to perform their part of the agreement.

In reference to Paragraph 5 of the aforementioned affidavit, Cliff Mortensen cites the various liens still against Fairview Development, Inc., but during May, 1953, he signed an FHA request for the final payment of the sum of approximately \$311,000.00 on the contract, made up by the National Bank of Commerce, as President of Fairview Development, Inc., in which it was stated that all bills incurred in the construction of Fairview Manor had been paid and that there were no liens against the property. Neither affiant nor Everett Nowell, as directors and owners of stock of Fairview Development, Inc., were responsible for any bills or

liens as a result of the Mortensen Company(s) operation as the contractor. The Mortensen Company collected \$3,080,000.00. Attached hereto, and marked Exhibit "A," is a letter of instruction from Josef Diamond, Mortensens' attorney, to their auditor, showing that they knew very well what the financial transactions of the corporation were. The auditor was also instructed by the Mortensens to alter his method of figuring depreciation, and instructed him to keep the books in such a manner that the amount in excess of \$100,000.00 which had been spent primarily for capital improvements, would appear on the books as having been spent for maintenance, maintenance materials and labor, thus placing the management in the light of having spent large sums of money for labor and materials in the routine operation of the project. At present a C.P.A. is auditing the books of the corporation and has found so many errors at variance with the true facts that he has found it necessary to make an amended report for the Bureau of Internal Revenue. These errors were made by the auditor hired by the Mortensens, and the bookkeeper hired by them for the project was found to be in default of approximately \$2,700.00 in September, 1953.

Mr. Jaureguy, who represented affiant, did not make the settlement, but advised affiant before he left Fairbanks that it had been done upon the advice of Mr. Cake to Dick Rushlight and that Cake had also advised Rushlight to get possession of

Fairview Manor without fail. It is true that affiant agreed to buy, but under no such conditions as agreed to by Rushlight. After the Mortensens had gotten all possible cash from the corporation, they have endeavored to cover up their shortcomings in the performance of the contract by claiming that the management had dissipated the funds of the corporation, and requested a receiver. Apparently, this was to be accomplished by the acquisition by Rushlight of all of the stock of Fairview Development, Inc., thus precluding affiant from any further actions as a director or stockholder of the corporation and preventing affiant from bringing the Mortensens to justice for their lack of performance of the contract agreement, although the full contract price had been obtained by the fact that Cliff Mortensen forged his name as president of the corporation and swore that all bills had been paid and the job had been completed according to the contract and specifications.

/s/ CASH COLE.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

EXHIBIT A

(Copy)

Law Offices
Lycette, Diamond & Sylvester
Eighth Floor Hoge Bldg.
Seattle 4

John P. Lycette
Josef Diamond
John N. Sylvester
Herman Howe
Earle W. Zinn

Mr. Herbert F. Lofquist,
Exchange Building,
Seattle 4, Washington.

Re: Fairview Development, Inc.

Dear Herb:

You will find enclosed copy of special combined meeting of stockholders and directors of Fairview Development, Inc., held on June 11 and 12, 1951. The enclosed minutes are correct and accurate, though they have not been signed by all of those present. The minutes are nevertheless true and correct minutes of the corporation.

You will note that in the minutes there is a provision that your office at Fairbanks, Alaska, will take certain action in connection with the rental of the apartments. Please be sure this procedure is put into effect and that you keep accurate accounts and records of the receipts and expenditures for the operation of the Fairview Manor. If you

will obtain the necessary corporate resolutions required by the bank at Fairbanks to permit the signing, endorsing and depositing of checks by you or your agent or employee located in Fairbanks, and forward them to us, we will see that they are properly executed. Please also discuss with Cash Cole and/or Cliff Mortensen the necessity of bonding your agent or employee who will be given the authority to handle the funds of the corporations. No bills or obligations of the corporation should be paid without approval and authority of an officer of the corporation.

You will also notice that you are required to charge pro rata insurance costs, taxes, interest and other expenses chargeable to the apartments taken over by the corporation, as well as all other proper expenses.

There are other matters included in the minutes which should also be incorporated in the books and records of the corporation. If you have any questions, please get in touch with us or with Cliff Mortensen or Cash Cole.

Yours very truly,

LYCETTE, DIAMOND &
SYLVESTER,

/s/ JOE DIAMOND.

JD/M.

cc: Cliff Mortensen.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN CONNECTION WITH MOTION TO SET ASIDE STIPULATION AND JUDGMENT BASED THEREON

State of Oregon,
County of Multnomah—ss.

W. A. Rushlight, being first duly sworn, upon his oath deposes and says:

That he is alleged to have acted in concert with the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and to have entered into a conspiracy to defraud defendant Cash Cole and is further alleged to have practiced fraudulent and deceptive practices upon him in connection with this case and makes this affidavit for the purpose of refuting these statements made in the defendants' motion to set aside and vacate the stipulation and judgment and in the affidavits of Cash Cole and Tom Cole attached to said motion.

That on the evening of October 5, 1953, your affiant was advised that Cash Cole had suffered a heart attack and that it would be impossible to continue with the trial which had been in progress in the above-entitled case. On the morning of October 6th the attorneys for the respective parties secured a recess of said trial for a period of two days until October 8th. Your affiant and Mr. Nicholas Jaureguy, the attorney for Cash Cole, were convinced, because of said physical condition,

that it would be for the best interests of Cash Cole to sell his interest in Fairview Development, Inc., to the Mortensens; and also because of statements theretofore made by Cole they believed that such sale would be desired by him. Accordingly, during the course of that day negotiations were carried on by your affiant and Mr. Jaureguy on behalf of Cash Cole and also by Everett Nowell and his attorney, John Hedrick, with the plaintiffs, seeking an offer from them to purchase all of the interest of Cash Cole and Everett Nowell in said project. Cole and Nowell owned the stock of a corporation which itself owned one-half of the stock of Fairview Development, Inc. A proposal was on that day secured from the plaintiffs to purchase said stock, said proposal being substantially the same as the agreement ultimately entered into, except that in the final stipulation the situation was reversed, that is, the sale was from Cole and Nowell to the plaintiffs instead of from the plaintiffs to Cole and Nowell. However, on Tuesday evening, October 6, or early the next morning, or both, Cash Cole advised affiant that he would not sell. Theretofore we had had many conversations about the possibilities either of selling or of buying; and after telling me that he would not sell, we again discussed the possibility of buying from the plaintiffs.

Accordingly, negotiations were begun on Wednesday, October 7, in an endeavor to arrive at an agreement with the plaintiffs whereby Cole would buy the interest of the plaintiffs; and thereby the

parties would settle the lawsuit. In connection with these same negotiations, it was found desirable, probably absolutely necessary, that the interest of Everett Nowell be also purchased. Accordingly, the negotiations with the plaintiffs were accompanied by negotiations with Nowell, both proceeding through Wednesday and Thursday, October 6 and 7. By noon of Thursday, October 7, it was believed that an oral agreement had been arrived at with both the plaintiffs and with Nowell for the purchase of their interests in Fairview Development, Inc.

On Thursday morning the court continued the case until 2:00 o'clock so that further negotiations could be had. At 2:00 o'clock plaintiffs' attorney asked the court to appoint a receiver. That motion was granted and a receiver was appointed. Both Cash Cole and I and also Cole's attorney believed that with the appointment of the receiver it became all the more important that, if Cole did not care to sell, he should buy.

Your affiant kept Cole advised of the negotiations but we did not enter into any extended discussions because of his physical condition. However on Friday morning, October 9, when the proposed stipulation had been reduced to writing in its entirety, Mr. Jaureguy and your affiant went to Cole's bedroom and there explained all the provisions of the stipulation. The more important provisions were read to him in full and the rest were fully ex-

plained. He and his wife, Ruth Cole, agreed to all the terms thereof and signed it.

In the meantime, the plaintiffs, when they were advised that the Coles had signed the stipulation, said they would insist upon a modification. This modification was that certain payments to be made by Fairview Development, Inc., should be made quarter-annually instead of annually as theretofore provided in the stipulation. We strenuously argued that such change should not be made, but the plaintiffs insisted upon it. We thereupon returned to the Coles' apartment and explained this change to them. They both readily agreed to it, and initialed the changes in the stipulation.

I caused a corporation in which I own the majority of the stock to pay to the plaintiffs \$1,000.00, to pay to Nowell \$1,000.00, and to pay to Nowell's attorney, John Hedrick the sum of \$5,000.00, all of which were required in connection with such stipulation. I also caused said corporation to guarantee to Nowell the payment of the last \$20,000.00 of a total of \$44,000.00 to be paid to him as the purchase price of his interest in the corporation controlled by him and Cole and which owned one-half the stock of Fairview Development, Inc.

Your affiant obtained from Nowell an assignment from him to Cole of his interest in said corporation, and obtained from Cole an assignment to your affiant of his interest therein. The agreement between Cole and your affiant, not, however, reduced

to writing, was that your affiant would cause to be paid all sums of money necessary to effect said transfer of the stock, also guarantee said \$20,000 to Nowell, and that Cole should receive a management contract for the management of Fairview Manor. The \$5,000.00 paid to John Hedrick was in payment of an assignment from him to a corporation controlled by your affiant of his claim against Fairview Development, Inc., for attorneys' fees, and said sum was to be repaid to your affiant's corporation by said Fairview Development, Inc.

That all of the statements contained in the motion and the accompanying affidavits of Cash Cole and Tom Cole to the effect that this affiant was engaged in a conspiracy with plaintiffs or any of them are completely and utterly untrue. Contrary to the statements contained in the affidavits of Cash Cole and Tom Cole and in the motion, not only was Cash Cole fully aware of what was going on, but understood each and every matter contained in said stipulation and all ancillary matters. One of the principal reasons for the present financial condition of Fairview Manor is the inefficient management and the numerous family members on the payroll.

Your affiant further states that at no time did Ruth Cole, Cash Cole, the doctor or Tom Cole advise or request him to refrain from seeing Cash Cole or discussing these matters with him.

/s/ W. A. RUSHLIGHT.

Subscribed and sworn to before me this 20th day of February, 1954.

[Seal] /s/ DENTON G. BURDICK, JR.,
Notary Public for Oregon.

My commission expires 10/29/54.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
SET ASIDE JUDGMENT AND IN OP-
POSITION TO MOTION FOR APPOINT-
MENT OF RECEIVER

United States of America,
Territory of Alaska—ss.

Allene Hendricks, being first duly sworn, upon oath deposes and says:

That she is bookkeeper for Fairview Manor, an apartment house project of Fairview Development, Inc., and is familiar with the books of account of Fairview Manor from the time of the opening of same.

That she has checked the operation figures since the opening date, especially in regard to the amounts expended on improvements and corrections of the contractor's mistakes, omissions and poor

workmanship. That the sums expended in this regard have had a very beneficial effect in reducing the monthly over-all operating expenses.

That she made up a comparative statement for the years of 1952 and 1953 which shows a saving in 1953 of \$15,354.89 over 1952.

/s/ ALLENE HENDRICKS.

Subscribed and Sworn to before me this 26th day of February, 1954.

[Seal] /s/ MARY LEE KENISON,
Notary Public in and for
Alaska.

My commission expires: 7/29/57.

Receipt of copy acknowledged.

[Endorsed]: Filed February 26, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
TO SET ASIDE AND VACATE THE
STIPULATION AND JUDGMENT BASED
THEREON

State of Washington,
County of King—ss.

The undersigned, Everett Nowell, being first duly sworn upon oath deposes and says:

That he has read the Affidavit of Cash Cole, subscribed and sworn to on the 26th day of February, 1954, and filed in the above-entitled cause; that the statement of Cash Cole contained therein that Hedrick and Morrissey did, at the instance of Everett Nowell, institute an action against Mortensen and Henderson in the United States District Court at Seattle, Washington, that Cash Cole was opposed to bringing said action in Seattle and felt that the proper place to bring such an action against the Mortensens and Henderson was in Alaska where the property is located, is untrue; that prior to bringing such action a conference was held in the law offices of Morrissey, Hedrick, Roberts & Dunham, at 1404 Vance Building, Seattle, Washington, and at such meeting, Cash Cole, in agreement with your affiant Everett Nowell, specifically ordered the attorneys, Morrissey Hedrick, Roberts & Dunham, to draft such complaint, serve it upon the Mortensens and Hendersons and file it in the United States District Court for the Western District of Washington.

That the activities referred to by your affiant in an Affidavit previously filed herein, which were performed by Cash Cole and were not for the benefit of Fairview Development, Inc., and of which your affiant had no knowledge prior thereto refers to, among other things, money of the corporation which was used for the benefit of Tom Cole and his truck, money used to send a daughter-in-law of Cash Cole, by airplane to Kansas City, Missouri, exorbitant

amounts of money amounting to thousands of dollars used by Cash Cole for telephone calls, vacations taken by Cash Cole in which he spent Fairview money and others which are all in the records of this matter.

The law firm of Morrissey, Hedrick, Roberts & Dunham, at all times represented Everett Nowell, your affiant, as well as Cash Cole. Cash Cole, from time to time, was dissatisfied with certain decisions when someone disagreed with him and brought in other attorneys, but Morrissey, Hedrick, Roberts & Dunham represented Cash Cole during all the controversies concerning Fairview Development, Inc. As a matter of fact, as of this date, Cash Cole has not discharged said attorneys, nor has he paid them a balance of an attorney fee due to them by him, in the amount of Seven Hundred Fifty (\$750.00) Dollars.

It has never been true that your affiant's responsibilities as a director in Bayview Realty and Fairview Development, Inc., were secondary to his personal affairs and Cash Cole in making that statement is not telling the truth. Your affiant has never gone along with the Mortensens' interests and has taken every step possible to protect Fairview Development, Inc., and the interests of Cash Cole and Everett Nowell.

Cash Cole states in his Affidavit that he has not received Nowell's stock in Fairview Manor. This allegation of Cash Cole is deliberately misleading

for Cash Cole knows that both he, Cash Cole, and your affiant, Everett Nowell, did not personally own or hold any stock in Fairview Development, Inc., but that they owned the controlling interest of Bayview Realty, Inc., and that Bayview Realty, Inc., owned and held one-half of the stock of Fairview Development, Inc., and that Everett Nowell, in compliance with the agreements entered into, transferred the stock owned by him of Bayview Realty, Inc., to Cash Cole and fully complied with all of the covenants and requirements of the various contracts entered into between Cash Cole and Everett Nowell. That Cash Cole has had all of the minutes and books of Bayview Realty, Inc., and your affiant, Everett Nowell, had none of them. Therefore, Everett Nowell had no memorandum to turn over to Cash Cole. The Statement that your affiant, Everett Nowell, appropriated approximately three thousand (\$3,000.00) dollars from cash belonging to Bayview Realty, Inc., and applied it on the payment of a Cadillac automobile is deliberately misleading, in that Kenneth Kadow loaned and your affiant, Everett Nowell contributed the sum of ten thousand (\$10,000.00) dollars each, or a total of twenty thousand (\$20,000.00) dollars to Bayview Realty, Inc., Cash Cole, at no time, has contributed or loaned any money to Bayview Realty, Inc. The using of the money to buy an automobile for the company was done in the ordinary course of business and with permission of the interested parties.

Cash Cole does not tell the truth when he states that the damage suit against the Mortensens was

suddenly, and without his knowledge or consent, filed and verified by Everett Nowell, for the reason that as stated heretofore, Cash Cole was well aware of all of the events concerning that particular lawsuit, instructed the attorneys to draft it and instructed Everett Nowell to verify the complaint so that it could be filed. Cash Cole at no time expressed the opinion that it would be brought in the Territory of Alaska.

That your affiant, Everett Nowell, repeatedly took action to stop Cliff Mortensen from signing any papers as president of Fairview Development, Inc., and any statement of Cash Cole to the contrary is not true.

/s/ EVERETT NOWELL.

Subscribed and Sworn to before me this 3rd day of March, 1954.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 6, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT IN OPPOSITION TO MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON

The undersigned, Cliff Mortensen, and Frank V. Henderson, being first duly sworn upon oath depose and say as follows in opposition to the motion to set aside and vacate the stipulation and judgment based thereon, filed January 8, 1954, and in opposition to the supporting Supplemental Affidavits to said motion executed by Cash Cole and Tom Cole:

1. With reference to Page I of the Affidavit of Cash Cole, dated February 26, 1954, that there was a deadlock in the management of the properties of Fairview Development, Inc., as set forth in detail in the affidavits heretofore filed herein by Plaintiffs; that as set forth in said Affidavits, there has been mismanagement of the properties of the Corporation and improper disposition of the funds and assets thereof, all as further evidenced by the testimony of Cash Cole heretofore given in this cause.

2. With reference to Page 2 of said Affidavit of Cash Cole, that the Plaintiffs herein misappropriated no funds in connection with the construction of Fairview Manor, nor did the Plaintiffs draw any funds in connection with said construction to which they were not entitled, nor were any such draws made which were not agreed to by Cash Cole; that the construction at Fairview Manor was completed

in accordance with the plans and specifications and was inspected and approved by the Federal Housing Administration; that no funds were expended by Defendant or by Fairview Development, Inc., by reason of either unworkmanlike construction, the use of inferior materials in construction, or the failure to complete construction; that while Cash Cole has from time to time complained of construction deficiencies, on analysis, such claims of deficiencies involved not inadequacies of construction (which construction was FHA inspected and approved) but rather involved alleged inadequacy of plans and specifications, which were prepared by the Architect of Cash Cole's choice.

3. With reference to Pages 3 and 4 of said Affidavit of Cash Cole, that the intention of Plaintiffs has never been other than to complete the construction of Fairview Manor in accordance with the Plans and Specifications and in a workmanlike manner and to attempt to secure proper management of the properties of Fairview Development, Inc., to the end that all of the Stockholders thereof would realize a reasonable profit from the operation of said properties; that the sole reasons that Plaintiffs sought the appointment of a Receiver to manage the properties of the Plaintiff Corporation, was to secure the competent operation and management of Fairview Manor for the benefit of all of the Stockholders of the Plaintiff Corporation and to prevent the property and assets of the Plaintiff Corporation from being dissipated and lost by reason of the un-

lawful and unauthorized acts and actions of Cash Cole; that pursuant to such intentions the Plaintiffs brought suit against Cash Cole in settlement of which Cash Cole executed the stipulation which he is now attempting to repudiate; that in reaching said settlement the Plaintiffs at no time acted in consort with A. G. Rushlight, his agents or representatives, nor Everett Nowell, his agents or representatives, but rather throughout all negotiations leading to said settlement, the interest of the Plaintiffs herein remained antagonistic to those of said A. G. Rushlight and said Everett Nowell.

4. With reference to Page 5 of said Affidavit of Cash Cole, that Cash Cole's sworn testimony given in this cause, speaks for itself on the subject of the many instances of mismanagement and misappropriation of the funds of the Plaintiff Corporation.

5. With respect to Page 6 of said Affidavit of Cash Cole, that the construction of Fairview Manor was completed in accordance with the Plans and Specifications; that the funds disbursed to the Plaintiffs herein were only those to which they were lawfully entitled; that Cash Cole was fully familiar with the disbursements made and agreed thereto; that there were liens filed by certain Sub-Contractors in connection with the construction of Fairview Manor, for work performed beyond that which was called for by the Plans and Specifications; that to protect Fairview Development, Inc., against foreclosure of said liens, Plaintiffs deposited in escrow

the full amount of cash necessary to cover said liens, that all of the said transactions were well known to and agreed to by Cash Cole and his then Attorneys; that Nelse Mortensen-Alaska Company has paid huge sums of money to Sub-Contractors for work performed beyond that called for by the Plans and Specifications without ever having received any payment therefore from Fairview Development, Inc.

6. With respect to statements made concerning Everett Nowell on page 7 of said Affidavit of Cash Cole, that the record in this cause will show that said statements are completely inconsistent with the sworn testimony of Cash Cole.

7. With reference to the Supplemental Affidavit of Cash Cole, dated February 26, 1953, that the statements made in said Affidavit, insofar as said statements are inconsistent with Affiant's Affidavits heretofore filed herein, are untrue; Affiants reaffirmed their said Affidavits as setting forth the true facts and deny that the facts are as stated in said Supplemental Affidavit of Cash Cole.

8. With reference to the Affidavit of Tom Cole, dated February 26, 1954, that as it appears on the face of said Affidavit that Tom Cole was not connected with Fairview Development, Inc., prior to April, 1953, in consequence of which it follows that Tom Cole can have no personal knowledge of the construction of Fairview Manor nor the financing thereof; that insofar as the Affidavit of Tom Cole purports to state facts involving Fairview Develop-

ment, Inc., which occurred prior to April, 1953, said Affidavit is untrue and merely reflects the self-serving statements made by Cash Cole to Tom Cole.

9. That Tom Cole was present and actively participated in the various negotiations leading up to the settlement; that as conceded in said Affidavit of Tom Cole, Tom Cole read and was thoroughly conversant with the stipulation which was later executed by Cash Cole and filed herein on October 9th, 1953; that the Affidavit of Tom Cole is inconsistent in that it states in Paragraph 2, Page 4, "Affiant further states that neither he nor Mrs. Cole had any appreciable knowledge of the contents of the instrument signed by Cash Cole * * *" while in Paragraph 2, on Page 2, the following statements appear " * * * and Affiant advised Dick Rushlight after the negotiations were completed that it was an utter impossibility to purchase Mortensen's, Henderson's and Nowell's stock on the terms set forth in the Agreements * * *" "Affiant also informed Mr. Jaureguy, one of Cash Cole's Attorneys, that the terms of the Agreement were impossible of fulfillment * * *"

10. That the stipulation did not provide that the stock of Fairview Development, Inc., be turned over to Cash Cole, but in fact provides as follows: "It is understood and agreed that said obligation in the sum of \$89,000.00 shall be secured by Cash Cole; Everett Nowell; and/or Bayview Realty, Inc., placing in escrow all of the capital stock of Fairview Development, Inc., (except the 100 shares of preferred stock) consisting of 450 shares by this Agree-

ment purchased by said persons and 450 shares of said capital stock owned by Bayview Realty, Inc.”

That the said Affidavits of Cash Cole and Tom Cole imply that the stipulation and judgment based thereon are unconscionable and confiscatory for the reason that there were not sufficient funds in the corporation to purchase the interests of the holders of 75% of the stock. In other words Cash Cole seems to be contending that, to be equitable, the stipulation which he signed should require only a disbursement of corporate funds to vest title to all of the corporation in him. This position is patently ridiculous and it was never within the contemplation of the parties that the funds to be paid by Cash Cole to obtain full control and ownership of the corporation would be paid solely out of income derived by Fairview Development, Inc.

That the matters raised in the said Affidavits of Cash Cole and Tom Cole were all the subject of litigation pending at the time the stipulation filed herein was executed; that said stipulation specifically recognized the existence of this pending litigation and was intended by all parties to finally dispose of it; that said stipulation is in all respects fair and equitable and was executed in good faith after prolonged negotiation and careful consideration by all parties and attorneys.

Dated at Seattle, Washington, this 5th day of March, 1954.

/s/ NELSE MORTENSEN,

/s/ FRANK V. HENDERSON.

Subscribed and sworn to before me this 5th day of March, 1954.

[Seal] /s/ J. E. SWANSON, JR.,
Notary Public for the County of King, State of
Washington,

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1954.

[Title of District Court and Cause.]

AMENDED MOTION FOR APPOINTMENT
OF RECEIVER

Now Come the plaintiffs, in the above-entitled cause, jointly and severally, Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., by their attorneys, and pursuant to leave of court first duly had and obtained, file this amended motion for appointment of receiver and do hereby state as follows:

a. That the principal defendants, Cash Cole and Bayview Realty, Inc., a corporation, or either of them, are collecting the rents and profits from the Fairview Manor apartments; that there are 272 such

apartments; that the gross collections from said apartments will approximate from \$31,000.00 to \$33,000.00 a month; that if a receiver is not appointed to make said collections, and damages result from loss of said rents and profits or any part thereof to the plaintiffs herein, said defendants will not be able to respond in damages.

b. That the property or the rents or profits therefrom and involved in this cause are in danger of being lost or materially injured or impaired, and said property and said rents and profits which are the subject of this action are now claimed by the plaintiffs herein as heretofore more fully set out in the pleadings and proceedings filed and taken in this cause, and a receiver should be appointed in accordance with the provisions of the general laws of the Territory of Alaska (A.C.L.A., 1949, 55-6-91).

c. That a receiver should be appointed to dispose of the property involved in this cause according to the final judgment entered herein as provided under the general laws of the Territory of Alaska (A.C.L.A., 1949, 55-6-91).

d. That the acts and actions of said defendant, Cash Cole, and his agents and representatives have operated to the detriment, loss and damage of the corporate and individual plaintiffs resulting in irreparable injury and damage to the property and assets of said plaintiff corporation and to the security and property of the individual plaintiffs.

e. That the property and assets of the plaintiff corporation are presently being dissipated and lost by reason of the unlawful and unauthorized acts and actions of the defendant, Cash Cole, or the Bayview Realty, Inc., or their agents and representatives.

f. That a receiver should be appointed for the purpose of protecting and preserving the property and assets of said plaintiff corporation and the interests thereof, and the interests of all of the stockholders of said corporation, including the individual plaintiffs.

Now Therefore, said plaintiffs do hereby move as follows:

1. That the court appoint a disinterested party as receiver, or reinstate Robert E. Sheldon, formerly acting as receiver in this case, to take over the management and operation of Fairview Manor Apartments at Fairbanks, Alaska, involved in this cause, until the pending motion of said Cash Cole and Bayview Realty, Inc., to set aside the stipulation filed herein on October 9, 1953, and the final decree based thereon, entered October 10, 1953, have been heard and disposed, and said defendants have complied with the terms and provisions of said final decree and the said stipulation, to collect all income therefrom and make all disbursements for current operating expenses, payments on the mortgage indebtedness, or otherwise, and account therefor to this court.

2. That said receiver upon qualifying be authorized and instructed to take immediate possession of

Fairview Manor Apartments and all other property of the plaintiff corporation, Fairview Development, Inc.; to collect and preserve the rents, issues and profits thereof; and that he have the general powers of receivers in such cases as well as such special powers as this court may grant to him from time to time; and that any party or parties who are or may come into possession of any portion or portions of said Fairview Manor Apartments attorn to said receiver and pay him rental for the use and occupancy of such portion or portions.

3. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, their heirs, special representatives, successors, assigns, agents, attorneys, employees and any representatives whatsoever be forthwith removed and disassociated from all management or operation, or any aspects thereof, of Fairview Manor Apartments, or any other matter relating to said project, or to the affairs of said corporation, and that said defendants and each of them be directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation by said receiver until further order of this court.

In support of said motion reference is hereby made by said plaintiffs to the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, the final decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, affidavits filed by

plaintiffs in opposition to motion of said Cash Cole and Bayview Realty, Inc., to set aside said stipulation and vacate said final decree, and the pleadings heretofore filed in this cause and the proceedings heretofore had therein, including the affidavits filed in support of the motion and amended motion for appointment of receiver.

Dated at Fairbanks, Alaska, this 19th day of March, 1954.

JOE DIAMOND and
EARLE ZINN,
COLLINS AND CLASBY,

By /s/ WALTER SCZUDLO,
Of Counsel for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT BY EVERETT
NOWELL IN SUPPORT OF MOTION FOR
APPOINTMENT OF RECEIVER

State of Washington,
County of King—ss.

Everett Nowell being first placed under oath deposes and says:

That he was one of the incorporators of Bayview Realty, Inc., an Alaska corporation, and was a stockholder and director of this corporation and held the

office of President until he released his interest in said corporation to Cash Cole at the time that the Stipulation settling the above-named lawsuit was entered into herein. That Bayview Realty, Inc., has no physical assets of any type, that the only asset of Bayview Realty, Inc., is four hundred fifty shares (450) shares of common stock of Fairview Development, Inc., an Alaska corporation; that shortly after the organization of Bayview Realty, Inc., your affiant, Everett Nowell, Cash Cole and Kenneth Kadow, all of Alaska, agreed that each would make a loan of ten thousand (\$10,000) dollars to Bayview Realty, Inc., so that it could carry out its functions as a corporation. Kenneth Kadow and your affiant advanced twenty thousand (\$20,000) dollars to Bayview Realty, Inc., in other words, ten thousand (\$10,000) dollars each. Your affiant and Kenneth Kadow then asked Cash Cole to advance ten thousand (\$10,000) dollars as he had previously agreed. Cash Cole replied that he was without funds and was unable to supply the money that he had heretofore agreed to loan the corporation.

That your affiant, Everett Nowell and Cash Cole were both directors and officers of Fairview Development, Inc., one of the plaintiffs herein, that for a period of time each were receiving the sum of one thousand (\$1,000) dollars per month as salary for services performed, paid by Fairview Development, Inc. The affairs of Fairview Development, Inc., developed to such an extent that it was necessary to make all possible savings and expenditures, there-

fore, as of December 1, 1952, your affiant, Everett Nowell, took himself off of the payroll and from that time on did not receive one thousand (\$1,000) dollars per month. At this time, your affiant discussed this matter with Cash Cole as to whether he would take himself off of the payroll and not receive one thousand (\$1,000.00) dollars per month henceforth. Cash Cole told your affiant that he had no other income, he had no assets, except his interest in Fairview Development, Inc., and Bayview Realty, Inc., and West Juneau, Inc., and Gastineau Utilities, Inc., all of which are Alaska corporations, and that if he did not receive this one thousand (\$1,000) dollars per month, he would have nothing to live on and he could not support himself and his wife as he had no other income and no other assets, and that it was essential for his existence to receive the said one thousand (\$1,000) dollars per month.

Further your affiant sayeth not!

/s/ EVERETT NOWELL.

Subscribed and Sworn to before me this 16th day of March, 1954.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

My commission expires December 1, 1955.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed March 19, 1954.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF CLIFF
MORTENSEN IN SUPPORT OF AMENDED
MOTION FOR APPOINTMENT OF RE-
CEIVER

State of Washington,
County of King—ss.

Cliff Mortensen, being first duly sworn on oath,
deposes and says:

That he is one of the plaintiffs above named and prior to the Stipulation and Decree based thereon made and entered herein in October of 1953, was a Director of Fairview Development, Inc. That at said time he was a stockholder of Fairview Development, Inc., and still is a stockholder in said corporation subject only to the agreement relating to the sale of his stock contained in the said Stipulation entered into as a part of the settlement consummated in the above-entitled action in October, 1953, as aforesaid.

That he makes this affidavit in support of the amended motion of the plaintiffs above named for the appointment of a receiver of Fairview Development, Inc., a corporation.

That affiant hereby refers to affiant's prior affidavit filed herein on February 13, 1954, in opposition to motion to set aside and vacate the Stipulation and Judgment based thereon, to the affidavit of Frank V. Henderson filed herein on February 13,

1954, in opposition to motion to set aside and vacate the Stipulation and Judgment based thereon, to the affidavit of Joe Diamond and Earle Zinn filed herein on February 13, 1954, in opposition to motion to set aside and vacate the Stipulation and Judgment based thereon, to the affidavit of Everett Nowell filed herein on the 13th day of February, 1954, and the 3rd day of March, 1954, likewise in opposition to the said motion to set aside the Stipulation and Judgment based thereon, to the affidavit of W. A. Rushlight filed herein on February 26, 1954, and to the supplemental affidavits of Cliff Mortensen and Frank V. Henderson filed herein on March 9, 1954, and by this reference makes said affidavits and each and every one of them a part of this affidavit, and having read the same and being fully familiar with their contents, reaffirms the facts therein stated as fully as if set forth at length herein.

That the defendants Cash Cole and Bayview Realty, Inc., are presently in possession of Fairview Manor, an apartment house situated in Fairbanks, Alaska, owned by Fairview Development, Inc., and are collecting the rents and profits thereof without accounting to the plaintiffs, and that said plaintiffs and affiant have no access to the premises or to the rents and profits nor to the books and records of the said Fairview Manor.

That substantial amounts of moneys are going through the hands of the defendants Cash Cole and Bayview Realty, Inc., each month, through the

collection of rentals of the apartments in said project, the collection of rentals from the garages in connection therewith and from the collection of the miscellaneous income from said project such as fees collected from the tenants for use of the laundry facilities, vacuum cleaners, etc.

That when said project first became occupied, the rental schedules for the units therein were as follows: 56 units at \$115.00 per month; 168 units at \$140.00 per month and 48 units at \$155.00 per month. That the total income from the rental of the apartments alone in said project, assuming full occupancy, would thus be \$37,400.00 per month or \$448,800.00 per year if the rentals being charged in said project are still the same as those rentals originally established. That affiant is informed and believes and therefore alleges that since the inception of said project the monthly rentals from said project have been increased and that accordingly the monthly income received from the rental of the apartments in said buildings would be in excess of the amounts stated if said project is fully occupied.

That in addition to the rental income from rental of the apartments in said project, there are 132 garages which, if all rented, produce an income of \$5 per month for 4 months of the year and \$20 per month each for 8 months of the year, making total rental income from garages being handled by the defendants in the amount of \$23,760.00.

That according to financial statement of Fairview Development, Inc., for the 12 months ended December 31, 1952, the corporation had income as follows:

Apartments	\$432,186.39
Garages	19,853.70
Miscellaneous income	6,694.55

making a total income from said sources for the 12-month period of \$458,734.64. That despite such fact, due to the mismanagement of the defendants, the corporation sustained a net loss during that period of \$56,340.73.

That affiant does not have access to current financial statements for the said project, but has every reason to believe that the income being collected from said project by the defendants Cash Cole and Bayview Realty, Inc., and for which said defendants are failing to account, is substantially the same as that indicated by the operations for the year 1952, to wit approximately \$458,734.64 per annum or \$38,227.88 per month.

That the defendants Cash Cole and Bayview Realty, Inc., are not financially able to respond in damages for any such sums belonging to the corporation which they are collecting and for which they are failing to account to the plaintiffs herein. That affiant is informed and believes and therefore alleges that the defendant Cash Cole has no other income than moneys he receives from Fairview Development, Inc. That as of October, 1953, the said defendant Cash Cole was drawing \$1,000 per month as a manager's salary from Fairview Development,

Inc., and was providing himself with an apartment rent-free. That from the time that affiant first became interested in Fairview Development, Inc., which was in 1950, the defendant Cash Cole has always professed to be in need of funds and repeatedly insisted upon being reimbursed immediately for all traveling expenses or expenses incurred on behalf of the corporation assigning as his reason for such urgency that "he needed the money."

That unless a temporary receiver is appointed for the project known as Fairview Manor owned by Fairview Development, Inc., pending a hearing on the merits on the motion to set aside the Stipulation and Judgment entered into in October of 1953, an irreparable injury will result to the corporation and to affiant and that the defendant Cash Cole and defendant Bayview Realty, Inc., are not able to respond in damages to the extent of such injury or any substantial part thereof.

Further affiant sayeth not.

/s/ CLIFF MORTENSEN.

Subscribed and Sworn to before me this 19th day of March, 1954.

[Seal] /s/ MARIAN M. PARKS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1954.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION
FOR APPOINTMENT OF RECEIVER,
AND IN SUPPORT OF MOTION TO
VACATE STIPULATION AND JUDG-
MENT

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, upon his oath deposes and says:

That he makes this affidavit in opposition to the original and supplemental affidavits of Cliff Mortensen, Frank V. Henderson, Everett Nowell, A. W. Rushlight, Diamond and Zim, in opposition to the Motion to Vacate Stipulation and Judgment based thereon, and in support of plaintiffs' Motion for Appointment of Receiver of Fairview Manor.

That in opposition to the original and supplemental affidavit of Everett Nowell, affiant states that in September, 1949, Bayview Realty, Inc., was incorporated under the laws of Alaska, by Everett Nowell, Ruth M. Cole and affiant. That Everett Nowell was elected President; affiant, Secretary-Treasurer and Ruth M. Cole, Vice-President. Affiant was, by resolution, given full authority to act in all business matters concerning the corporation. That affiant also owned 25% of the stock of West Juneau, Inc. That affiant and Nowell, and the other owners of West Juneau, Inc., transferred

100 lots of West Juneau, Inc., to Bayview Realty, Inc. The purpose of this transfer of lots was to carry out a building project which had been promoted by Kenneth Kadow, who was then a Special Agent of the Department of the Interior for the promotion of housing in Alaska.

A contractor had been secured and four houses, known as the "lock-wall" type, were prefabricated for immediate erection.

Everett Nowell placed \$10,000.00 in Bayview Realty, Inc., and Kadow placed the same amount to the credit of Bayview Realty, Inc., and received a note for the same, with the understanding that the amount would be credited on the purchase price of one of the houses to be built by Bayview. Two of the houses Kadow took to Fairbanks and erected on Alaska Railroad land. The other two houses were erected on lots furnished by Bayview.

Affiant installed a water system at West Juneau, furnishing all labor for the installation of mains from the reservoir to the project.

In the meantime, affiant had been negotiating with the City of Fairbanks for a lease on city ground for a large housing project, and after considerable time and expense, secured a 75-year lease on the ground. Then affiant began negotiations for a commitment from the FHA in Juneau, which was finally granted.

Affiant then incorporated Fairview Development, Inc., with Everett Nowell as President, affiant as

Secretary-Treasurer and Cliff Mortensen as Vice-President. Upon the incorporation of Fairview Development, Inc., the lease of the City of Fairbanks land was put in the name of that corporation.

Upon the completion of that phase of the project, affiant went to Seattle to complete arrangements with the contractors, Nelse Mortensen-Alaska Company.

In taking care of the above-mentioned business up to and including the closing of Fairview Development, Inc., affiant has spent over \$10,000.00 and devoted 15 months of his time without any compensation.

The statement contained in Nowell's affidavit that Kadow had loaned Bayview Realty, Inc., \$10,000.00 is not true. Although Kadow did want to become a stockholder in Bayview, affiant objected, as Kadow was an agent of the United States and affiant did not believe that he could legally be connected with anyone in the housing business.

Upon affiant's departure in 1950, Nowell made some arrangements without my knowledge or consent, which gave Kadow full authority to act in any manner he saw fit in transacting business of West Juneau, Inc., Gastineau Utility, Inc., and Bayview Realty, Inc. The 100 lots which had been conveyed were apparently reconveyed to West Juneau, Inc.

The four houses purchased were sold, and a number of lots were sold to the Alaska Housing Author-

ity for \$16,000.00. Money was secured from the Territory for road building and all of this business was transacted by Kadow, who styled himself as "General Manager" of West Juneau, Inc.

At this time, affiant was Secretary-Treasurer of West Juneau, Inc., and remained such officer until October, 1953, but during all that time had never seen an accounting, and when affiant attempted to draw a check on the company bank account in the sum of \$400.00 to pay the company's taxes for 1952, the said check was dishonored at the bank, as the signature was not authorized by the corporation. To my knowledge, Kadow did own one share of stock, and affiant could get nothing but evasive explanations from Nowell that he had not agreed to it.

The two houses erected in Juneau were sold and the money placed in escrow with Mike Monagle, who represented Kadow and Nowell. When inquiry was made by affiant of Kadow, in the presence of Nowell, as to the financial condition of the company, and what had become of the funds from the sale of West Juneau lots to the Alaska Housing Authority, and the sale of the four prefabricated houses, Kadow stated that after the payment of commissions in the sum of \$4,200.00 on the sale of the West Juneau lots, and for which a check had been drawn on West Juneau, Inc., in that sum, the account balanced off.

The Bayview transactions were about the same, there being a slight loss, although the houses sold for \$27,000.00 each. Kadow had his house and Bay-

view still owed him \$4,600.00, or thereabouts, on his note.

Affiant had been given to understand by Nowell and Kadow that Sealand Construction Company, as an experiment in erecting "Lockwall" houses, would pay one-half of the labor, but, in the settlement, Kadow said the contractors demanded and were paid for all their labor expenses.

Mike Monagle wrote affiant on March 5, 1954, that he had no recollection of handling any money transactions for Bayview Realty, Inc. Affiant received a letter from Kadow stating that the settlement with the contractors was on a fifty-fifty basis, so evidently Kadow got the other half of the labor costs.

To this date, affiant has been unable to secure from Kadow, Nowell or their attorneys, the papers or documents covering the transactions indulged in by Kadow or Nowell. Mr. Nowell states in his affidavit that Bayview Realty had no assets, other than 450 shares of Fairview Development, Inc., stock. That is true, as Kadow and Nowell had removed all assets of the corporation, leaving only the 450 shares of Fairview Development, Inc., which had been placed there by an expenditure of \$10,000.00 and fifteen months of affiant's time. Nowell contributed nothing to Fairview Development, Inc., nor did he devote any of his time to the initial work on Fairview. All this time he was employed by Alaska Freight Lines.

His statement that affiant furnished no funds to Bayview is false. Nowell contributed nothing to the original organization of Fairview Development, Inc., but did, until December, 1952, receive \$1,000.00 per month, which was one-half of the \$2,000.00 management fee, and drew from the Fairview Development, Inc., approximately \$20,000.00, although he put in no time at the apartment house, Fairview Manor, and worked all the time at Seattle, Washington for Alaska Freight Lines. During all the time Nowell was receiving \$1,000.00 per month, affiant received the same amount monthly and had the active management to the date hereof, and has devoted his full time to the project and the management thereof.

That, due to the contractor's, Nelse Mortensen-Alaska Company, failure to complete the buildings and install the mechanical part of the project in its entirety, the sum of \$142,228.15 or more was expended out of rentals to make good the contractor's shortcomings. But in spite of this heavy drain out of rentals, affiant has been able to make all payments on the mortgage, to wit: Approximately \$21,600.00 monthly and keep all current bills paid and improvements made which has resulted in savings in operation of more than \$15,000.00 per year.

That the expenditures for costs of construction chargeable to Nelse Mortensen-Alaska Company and other items payable by said contractor is attached hereto, marked Exhibit "A" and made a part hereof.

That by reason of doing the things the contractor had failed to do under the contract, the following savings have been effected in operational costs:

Savings in labor	\$1,484.00 per month
Saving on coal (1953)	3,500.00 per year
Saving in electricity (1953)	3,600.00 per year
Saving in water treatment	
since September, 1953 . . .	250.00 per month

That affiant has familiarized himself with all mechanical operations of the project and has, from the beginning, made improvements in the water distribution system and heating system, which have materially reduced the cost of operation and reduced the number of employees necessary to operate the project as hereinbefore shown.

That the appointment of a receiver could cause great damage to the project, as the heating system is controlled by a very complicated automatic electronic board, which, if it gets out of balance, can immediately shut off the entire system unless some one familiar with the operation of the board is available. Even the contractor who installed the electronic board did not understand the operation of the board, and it was only through a period of study and numerous communications with the factory that affiant has become familiar with the system. The only other person in Fairbanks or vicinity who understands the electronic board is Tom Cole, who has been connected with the operation and

maintenance of Fairview Manor for more than one year last past.

To entrust the operation of Fairview Manor to inexperienced persons would be to jeopardize the entire project.

The Mortensens and Henderson clamor about the dissipation of funds, but their intense desire is to secure control of the project in order to cover up the swindle which was perpetrated upon the owners and upon the Federal Housing Administration, as more fully shown by the Cross-Complaint lodged with this Court which clearly shows that the Mortensens and Henderson, as contractors, defrauded the owners and the FHA in excess of One Million (\$1,000,000,000) Dollars and did fraudulently withdraw, by false affidavits, a sum in excess of \$320,000.00 from the Seattle National Bank of Commerce, which funds were the property of Fairview Development, Inc., as more fully shown by letter from Pritchard & Lofquist, C.P.A., dated June 3, 1952, and marked Exhibit "B" and made a part hereof.

It is evident that the plaintiffs herein desire to secure control of Fairview Development, Inc., to head off an investigation that has been launched by the Senate Investigating Committee, as by having control of the books and property, they can conceal their obvious successful attempts to defraud the defendants herein, as hereafter shown.

That affiant and his wife secured a lease from the

City of Fairbanks to the land upon which Fairview Manor is situated. They, in turn, assigned the lease to Fairview Development, Inc., which secured a commitment from FHA for 272 rental units to be built upon the land.

An agreement was entered into with Nelse Mortensen-Alaska, Inc., to build the apartment buildings, with Fairview Development, Inc., furnishing the land and commitment, and Mortensen Co., to receive the total commitment of \$3,080,000.00 and was to pay to Bayview Realty, Inc., or Cash Cole and Everett Nowell one-third of the profit on the contract.

The Fairview Development, Inc., agreed to assign to the contractor, Nelse Mortensen-Alaska, Inc., one-half ownership in the Fairview Manor when the project was completed, as specified in Construction Contract-Lump Sum, FHA Form No. 2442.

The original owners of Fairview Development, Inc., to show their good faith, permitted Cliff Mortensen to become a director of Fairview, and as further evidence of good faith, 900 shares of stock in the corporation was issued—450 to Bayview Realty—150 to Cliff Mortensen—150 to Nelse Mortensen and 150 to Frank V. Henderson, all of said stock to be held in escrow until the successful completion of the buildings.

Bayview stock had all been earned and paid for, as hereinbefore set out, and should have been retained by Bayview, but to maintain harmony, affiant

agreed to leave the Bayview stock with the 450 shares of Fairview stock issued to the Mortensens and Henderson in escrow until the completion of the contract.

Continuous discord had existed between the contractors and the other parties from the very first meeting of the Board of Directors and their attorney was continuously and persistently trying to upset the authority of the majority vote of the Board of Directors. As work progressed, it developed that the National Bank of Commerce was deeply involved financially with the Mortensen group, and in place of being a fair and impartial mortgagee, they were continuously doing things that were unfair to Fairview Development, Inc.

The regular procedure for draws by the contractor should have been as outlined in the FHA contract signed by both parties, with money released for the draws to the corporation which, in turn, would make the money available to the contractor. This procedure was completely by-passed by Cliff Mortensen, who presented to the National Bank of Commerce what purported to be a resolution authorizing the acceptance of the draws and Cliff Mortensen's signature on the released checks from the bank made payable to Fairview Development, Inc., as sufficient to release the money to him, thus by-passing the corporation completely. A letter of protest was sent the bank signed by Everett Nowell, as President, and Cash Cole, as Secretary-Treasurer of Fairview Development, Inc., but the bank paid

no heed to the letter and continued to release the money until all that remained of the total commitment was the 10% withheld according to FHA provisions to insure the completion of the job, which amount was \$311,687.68. The contractor, contrary to his agreement, permitted liens to be placed upon the buildings, some of which still remain.

The National Bank of Commerce could carry the loan during the term of interim financing, but immediately the work was completed, it had to transfer the loan to the long-time lender, as their lending capacity was in the neighborhood of a million dollars. The title company would not guarantee the title with the liens upon the property and the Mortensens could not furnish the funds to guarantee the liens which amounted to some \$470,000.00. So affiant and Nowell were asked to aid again by permitting the money to be placed in an escrow account to insure the payment of the liens. Nowell and affiant agreed to this procedure with Mortensen and the Bank, who were in grave trouble if the loan could not be transferred, but it was understood, and we were given assurance by the Bank, that the money would be retained by the Bank and not released until all bills were paid and liens removed. Immediately this was done, the Bank made up a request on FHA form asking for release of the final payment to the contractor. This form was not presented to the corporation, but was signed by Cliff Mortensen, as President of Fairview Development, Inc., and it stated that all bills were

paid and that there were no liens against the property. Thus the corporation was deprived of its right to withhold from the final distribution of moneys, payments that were due to Fairview Development, Inc., in the sum of over \$100,000.00, and other amounts due sub-contractors. Thus Mortensen, in the gratis seat on the Board of Directors, having paid no money and having failed to complete the contract, exercised an unfair and unscrupulous method in depriving Fairview Development, Inc., of the full completion of plans and specifications outlined in the contract, in addition to forcing the corporation to expend from surplus rents over \$142,288.15 for bills due to be paid by the contractor and the cost of unfinished work on the buildings as provided in the plans and specifications that had to be done in order to keep the project operating. The Mortensens then come forward with the claim that the project has been mismanaged and the funds earned dissipated and want the management removed for one reason and one reason alone, and that is to cover up the shortcomings in the performance of their contract and the forced expenditure of funds from earned rents that should have been paid by them.

In answer to their charge of mismanagement and dissipation of funds affiant submits a recent report of a survey conducted by J. F. Campbell, Vice-president and Manager Mortgage and Loan Department of the Seattle Trust and Savings Bank, which is the representative of the long-time mort-

gagee, the Institutional Securities Corporation of New York, and the only agencies directly interested in the financial and physical welfare of the property; the second paragraph of which has the following to say: "First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance, but after my examination of the premises and familiarizing myself with the problems which you have had to face, one cannot help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project." This letter, marked Exhibit "C" is attached hereto and made a part hereof.

In summarizing, it should be borne in mind that the Mortensens brought their original charge in the name of Fairview Development, Inc., as an individual director; that there was no resolution of the Board of Directors authorizing such action; that the Mortensens are not in possession of their 450 shares of stock which could only be earned by their fulfillment of the contract, and this we submit in our Cross-Complaint with plenty of evidence to show that they have never completed the contract, according to Article 2, "Time of Completion," in the construction contract between the contractor

and Fairview Development, Inc., which specifically provided that in no event shall the owner be liable to deliver any such shares to the contractor, nor shall the contractor be entitled to exercise any rights as the holder of said shares until final payment is due and payable as herein set forth.

In reference to the statement of Cliff Mortensen on Page 3 of his Supplemental Affidavit in support of Amended Motion for Receiver in which he alleges that the Fairview Manor showed a loss of \$56,340.73, this is not true, as during the prior year expenditures of Fairview Development, Inc., made to complete work which the Mortensens and Henderson failed to do under their contract, amounting to \$14,766.68, were transferred to 1952 expense account. That the sum of \$14,850.26 expended in prior years was transferred to 1951 expense account. It was during the years of 1951 and 1952 that the sum of \$142,288.15 was paid out of rental income to perform necessary work which the plaintiffs failed to do under the contract. This should have been carried as capital gains, but was carried as current expenses.

Vacancies are carried as an expense. In 1953, in spite of vacancies, shown as \$52,318.75, the book loss was only \$30,718.07. This is illustrated by the breakdown for 1953 and the first three months of 1954, prepared by Allene Hendricks, accountant, which is marked Exhibit "D" and made a part of this affidavit. Although the three months of 1954 are the cold months, with a larger volume of

vacancies, the actual operating loss, including vacancies has been only \$10,411.77.

Vacancies for the year 1953 amounted to \$52,-318.75, and the operating loss for the year was \$30,-718.07. The same thing took place this past winter as happened during the year of 1952. The Military opens their housing in the middle of the Winter, instead of the Summer, and, of course, in the Winter there is no surplus of tenants or demand for housing and the loss simply has to be absorbed. Our loss in 1952 was slightly over \$52,000.00. This year was \$20,000.00 less. Most of the saving was made in cutting the cost of operating. The average monthly expense for 1953 was \$28,578.58. As compared to the first three months of this year—January, February and March—the saving each month was well over a thousand dollars. Thus, last year, in March, when we had current accounts payable for coal and light, the total was approximately \$22,000.00, but as of January, our loss added up to a little over \$10,000.00, which at the present rate of occupancy, we will have paid off by the first of June. So the year 1954 will find the project in much better financial condition when Winter arrives. This has been due solely to savings that have been made by improvements in the boiler rooms, amounting to a saving of approximately \$3,000.00 a month. The only large item of expense we have this Summer is the exterior painting which has to be done over, on account of the water leakage behind the plywood covering on the building due to lack of proper in-

stallation by the contractor. Otherwise, the project, notwithstanding all the handicaps that have been placed upon it by the plaintiffs, as contractors, can survive and fill a much-needed housing requirement in the city of Fairbanks.

Now, for comparison of management efficiency, affiant calls the Court's attention to a housing project owned by the plaintiffs, Mortensens and Henderson, at Fairbanks, Alaska, known as Island Homes. This project consists of approximately 200 dwellings which were completed in 1952. From the time of completion to the Fall of 1953, the said project was 90% vacant, and at the date hereof, according to available information, 40% or more vacant. Will the plaintiffs be as successful managing Fairview Manor as they are managing Island Homes?

Cliff Mortensen complains of affiant's drawing \$1,000.00 per month, with apartment. Is that an exorbitant salary for managing a three-million-dollar project? Cliff Mortensen, with a few strokes of a pen to fraudulent affidavits, drew in excess of \$330,000.00, the money of Fairview Development, Inc.

Affiant has put all of his money and four years' work into Fairview Development, Inc. The Mortensens and Henderson have contributed nothing to the project, and now want to deprive affiant of all his interest in the same without any consideration whatsoever.

The contract for management was made by affiant with Fairview Development, Inc., when Everett Nowell and Cliff Mortensen were the other two directors.

No injury can result from affiant's operation of the project. The lending agency, Institutional Securities Corporation of New York, is very well pleased with affiant's management. As the mortgagee of the project, with a loan of \$3,080,000 at stake, they have implicit confidence in affiant's ability to properly manage the project, as shown by the letter of J. F. Campbell, of the Seattle Trust and Savings Bank of Seattle, the representative of the mortgagee.

No showing has been made that affiant could not respond in damages, if damage did result from his management of the project. Mere conclusion and unfounded statements are no evidence of affiant's inability to respond in damages. Bayview Realty, Inc., owns 450 shares of stock in Fairview Manor, which is one-half of all the stock outstanding and represents an ownership by affiant of one-half interest in Fairview Development, Inc. Such a one-half interest in a three-million-dollar housing project should be ample security against damage from mismanagement.

Exhibit "D," showing the income, operating expenses and fixed charges for the years 1953 and 1954, up to and including March 31st, taken in conjunction with Exhibit "A," attached hereto, which shows in excess of \$140,000.00 expended out of rentals for the contractor's shortcomings, the finan-

cial position is very good. If the contractors had performed the contract according to plans and specifications, the project would have now a healthy bank balance.

One item of the contractor's failure to follow plans was the construction of all the buildings below the grade established by the architect, which requires snow removal to prevent melting snow or heavy rains from flooding the basements. The average yearly expense for this one item is \$10,000.00.

In summarizing, affiant believes that the facts, as presented herein by the defendants, clearly indicate that affiant has been the victim of a fraudulent scheme concocted by Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, individually, and through their alter egos, Nelse Mortensen-Alaska, Inc., and Nelse Mortensen Construction Company, and aided and abetted by Everett Nowell and W. A. Rushlight.

Exhibit "B," attached hereto, is a copy of a letter written by the accountant of the Mortensens and Frank V. Henderson. This Exhibit shows beyond doubt that Cliff Mortensen withdrew from the Seattle National Bank of Commerce, a sum in excess of \$320,000.00, which were funds of Fairview Development, Inc., and deposited said funds in the account of Nelse Mortensen-Alaska, Inc

Exhibit "A," clearly indicates the funds expended by affiant in doing work that should have been done by plaintiffs and meeting other obligations of the contractor.

Defendants' Cross-Complaint, lodged in this case, to which reference is hereby made, sets out in detail all matters in which the plaintiffs were derelict in their duty in the construction of the apartments. Dereliction of duty is a term much too mild; in fact, the actions of the defendants have resulted in investigators for the Senate Investigating Committee to make lengthy study of the plaintiffs' non-performance of the contract for the building of Fairview Manor, and the recovery of funds from the lending agency, which loan was guaranteed by FHA, an instrumentality of the United States.

Furthermore, affiant believes that he should be relieved of the obligation of the stipulation entered into by all the parties hereto, and the judgment based thereon, for the reasons set forth in affiant's Motion to wit: Mistake, excusable neglect, surprise and fraud practiced by plaintiffs and by conspiracy between the plaintiffs and W. A. Rushlight and Everett Nowell.

Denial of defendants' Motion to set aside and vacate the stipulation hereunto entered into by the parties and the judgment based thereon would deprive the defendant of his day in Court, and would enable the plaintiffs to perpetrate the greatest swindle in the history of Alaska.

Affiant makes a part of his Motion to vacate and set aside the stipulation and judgment based thereon and in opposition to plaintiffs' Motion for appointment of receiver all the affidavits heretofore filed herein by this affiant, Tom Cole, Ruth Cole, Dr.

Ribar, Allene Hendricks, and defendants' Amended Answer and Cross-Complaint lodged herein.

/s/ CASH COLE.

Subscribed and Sworn to before me this 2nd day of April, 1954.

[Seal] /s/ WARREN A. TAYLOR,
Notary Public in and for
Alaska.

My commission expires 8-11-55.

EXHIBIT A

(Copy)

Fairview Development, Inc., Charged to Nelse Mortensen-Alaska Company for Expenditures by Fairview Development for Costs of Construction and Other Items Payable by the Contractor

Item No.	Description	Amount
1.	4—11½ h.p. water pumps installed, substituting for 2—15 h.p. water pumps	\$ 3,146.26
2.	Fire Extinguishers (in plans)	1,461.24
3.	Fire hose racks (in plans)	1,565.49
4.	Fire hose (in plans)	571.40
5.	Fire rope (in plans)	108.67
6.	Silent check valves (in plans)	300.00
7.	Hot water controls (in plans)	243.64
8.	32 meters for laundry (in plans)	1,032.05
9.	Laundry room changes in specifications (in plans)	1,048.10
10.	Storm windows and ventilating water pipes in garages furnish heat from halls to keep from freezing	3,500.00
11.	Louvres installed to keep ice from forming on roof (in plans)	5,000.00

12.	Apartment door numerals (in plans)	137.03
13.	Interest on mortgage: Payable by contractor	
	Due 1-1-52	\$9,075.26
	30 days delinquent interest	30.25
	Due 2-1-52	9,194.76
		<hr/>
		18,300.27
14.	Real estate taxes, levied 8-1-51—payable by contractor	31,612.00
15.	Removal of ice caused by failure of contractor to install ventilators in attics—4 men for 5 months @ \$500.00 per month per man	10,000.00
16.	Services of firemen on unfinished building	560.00
17.	Rent of apartment for Frank Henderson for 11 months (up to and including August, 1952)	2,226.00
18.	Rent of garage for Frank Henderson for 11 months	200.00
19.	Cost of installation of second well, based on bid (in plans)	15,000.00
20.	Cost of connection hook-up on fire hose, hanging fire extinguishers and installing fire ropes	3,600.00
		<hr/>
	Total	\$101,612.15
21.	Covering exposed heating pipes in hallways (in plans)	2,000.00
22.	Extending smokestacks, material and labor	5,000.00
23.	Other labor and expenses connected with installations and improvements	35,616.00
		<hr/>
	Grand total	\$142,228.15

EXHIBIT B

(Copy)

Pritchard & Lofquist
Certified Public Accountants
1711 Exchange Building
Seattle 4, Washington

June 3, 1952.

Mr. Cash Cole,
c/o Fairview Development, Inc.,
Box 647,
Fairbanks, Alaska.

Dear Cash:

In checking the records of Nelse Mortensen Alaska Co., for the current year to date, we noted that the funds of Fairview Development Co., which had been retained by the National Bank of Commerce, being the retained percentage of the construction funds and the unused balance of the mortgage interest funds, which funds totaled \$311,-687.68, appear on the books of Nelse Mortensen Alaska Co., as having been paid to them on April 29, 1952. Their books further show that on May 7, 1952, they received from the National Bank of Commerce, the balance of funds in escrow for working capital in the amount of \$10,125.49.

In attempting to get a verification of these amounts paid, such as to whom the checks were issued, we were advised that the payment of \$311,-687.68 was released on May 1, by cashier's check and that the sum of \$10,125.49 was released on May

7, 1952, on a mortgage loan check No. 6030 payable to Fairview Development, Inc.

* * *

Yours very truly,

PRITCHARD & LOFQUIST,

By /s/ H. F. LOFQUIST.

EXHIBIT C

(Copy)

Seattle Trust and Savings Bank
Second Avenue at Columbia Street
Seattle 4, Washington

30 June, 1953.

Fairview Development, Inc.,
Fairview Manor,
Building #2, Office,
Fairbanks, Alaska.

Attn: Mr. Cash Cole.

Re: ISC Trust T241-1—Fairview Manor,
Fairbanks, Alaska,
FHA Project #130-42013.

Dear Sirs:

After my inspection of this apartment property, I communicated with the Institutional Securities Corporation of New York, for whom we service the underlying mortgage and we now have their in-

struction to report to you in detail of our findings on the condition of the buildings, and to request that you prepare for us a schedule for repairs so that some assurance can be given to the Institutional Securities Corporation that the necessary work is to be done before the arrival of cold weather.

First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance, but after my examination of the premises and familiarizing myself with the problems which you have had to face, one can not help but admire the management's approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.

You must realize that the various claims and interests of the individual owners of the stock of Fairview and their individual problems, are of no concern to the mortgagee or to us as servicing agent for them; our interest at this point is purely one of preservation of the security of the mortgage.

The requirements for the project, as a whole, are:

1. Correction of grade of sidewalks to bring them above the level of the moisture. We recommend that all sidewalks be covered with an additional 5½ to 6 inches, up to the level of the present first steps.

2. A program for interior decoration should be begun, and until some better yardstick is offered, we think the figure in the FHA Project Analysis estimated at \$19,168.00 per annum would be an acceptable figure. If interior decorating is done on a program basis, repainting the interiors and trim as necessary, you will not face heavy expenditures with available funds lacking at some future date, and your occupancy should continue to be maintained at a high level.

3. Landscaping and planting has not been satisfactorily complete, and this must be done in order to comply with the building program. Unless this is done to implement the attractiveness of the project, we feel that competition with other attractive rental units will seriously impair the occupancy of your apartments.

We call to your attention that the National Bank of Commerce, here in Seattle, holds a deposit in escrow of \$8,800.00 to assure the completion of landscaping and planting; and that it also holds in addition the sum of \$1,080.00 for completion of curbs and driveways. We are informed that the FHA has accepted the curbs and driveways and therefore assume that you may now seek the release of those funds; however, we find no record of their acceptance of the landscaping and planting and so we assume that the work must be completed in a manner satisfactory to the FHA and that you may thereafter seek the release of the funds held for that purpose in the aforementioned escrow.

Our review of the individual buildings indicates the following repairs to be necessary, in addition to the above specific requirements for the over-all project:

Building No. 1

Exterior paint is needed on the west end of Section "E"; on the west end of Section "B"; and on the south side of Section "H." We concluded that these items are urgent for the preservation of the security.

Building No. 2

Exterior paint is needed on the west side of Section "H"; on the east side of Section "H"; and the south sides of Sections A, B, D & E, also G & H; and on the west side of Section "A."

The ridge cover has apparently been damaged either in the process of installing vents on the building or in ice removal, and this should be immediately checked and straightened or replaced.

Also the grade of the driveway should be changed from the rear of the building to carry the water away from the building at Section "D," to eliminate the possibility of water draining into the boiler room.

Building No. 3

Exterior paint is badly needed on the west end of Section "H"; on the south side of Section "H," and on the east side of Section "H." Also there is evidence of some necessary roof repair on this building.

and it is recommended that aluminum patches be put over the holes created by ice chopping. It is also noted that the change-over on the 3-way valve was to have been completed during the early part of June, and we should appreciate your confirmation that this work has been satisfactorily completed.

Building No. 4

Exterior painting is urgently needed on the south and west sides of Section "A"—on the south side of Section "B," and on the east side of Section "H." Also, some of the driveway adjacent to this building has been damaged and should be replaced. During the early part of June you were in the process of completing the change-over onto the 3-way valve in this building also and we shall appreciate your advice whether that work has been satisfactorily completed.

In connection with the roof repairs mentioned as necessary regarding Building #3, it may be found that there are additional holes in the roof structures on parts of the other buildings, although we were unable to find them without the proper equipment, and it is suggested therefore that a careful survey of all the roofs be made by a competent workman who would make all of such repairs as are found necessary.

We shall appreciate your immediate acknowledgment of this letter, and a detailed report in the very near future of your plan for the maintenance of

the property which we deem so necessary in order to protect the security of the mortgage and to eliminate waste to the property.

Yours very truly,

/s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

JFCampbell:awe

Via airmail

cc: Mr. C. A. Carroll,
FHA Terr. Director,
Juneau, Alaska.

EXHIBIT D

1953	Income	Expenses	Average Monthly Expense
Total estimated income from all available sources	\$506,413.44		
vacancies		\$ 52,318.75	
Total operating expenses including interest (\$10,023.00)		342,943.02	\$ 28,578.58
Payment on mortgage		141,869.75	
	<hr/>	<hr/>	<hr/>
	\$506,413.44	\$537,131.51	
Loss			\$ 30,718.07

1954	Jan.	Feb.	Mar.
Total estimated income from all available sources	\$ 43,077.40	\$ 43,119.92	\$ 42,973.87
	<hr/>	<hr/>	<hr/>
vacancies	8,575.81	8,630.47	6,874.15
Total operating expenses including interest (\$10,023.00)	27,030.02	27,437.79	26,135.00
Payment on mortgage	11,653.24	11,653.24	11,653.24
	<hr/>	<hr/>	<hr/>
Total	\$ 47,259.07	\$ 47,721.50	\$ 44,653.24
	<hr/>	<hr/>	<hr/>
Loss	\$ 4,121.67	\$ 4,601.58	\$ 1,688.52
Total loss			\$ 10,411.77

taken from the books of Fairview Development, Inc., as of March 31, 1954.

/s/ ALLENE HENDRICKS.

EXHIBIT E

(Copy)

Kenneth D. Gillanders
Certified Public Accountant

March 22, 1954

Telephone 3033,
516 Second Avenue,
P. O. Box 1210,
Fairbanks, Alaska.

Mr. Cash Cole, President,
Fairview Development, Inc.,
Bldg. 2, Apt A-2, Fairview Manor,
Fairbanks, Alaska.

Dear Mr. Cole:

In accordance with your request to assist your bookkeeper with the closing of your accounts and records for the year ended December 31, 1953, the following report is herewith presented.

Scope of Work Done

Upon inspection of the records it was immediately recognized that more than the normal assistance with closing work would be necessary in order for the accounts and records to in any way reflect the actual status of the project at December 31, 1953. At this time a further conference was held with you pointing out the following major discrepancies, and incomplete factors:

1. There were no prior year Certified Audit Reports on file.

2. Prior auditors' adjustments in 1952 affecting 1951, and 1953 adjustments affecting both 1951 and 1952, had not been adjusted retroactively that is, there was no evidence that 1951 and 1952 Federal and Territorial Income Tax Returns had been amended to show these major adjustments.

3. Depreciation on apartment buildings had been taken on the 1951 returns at the rate of 5% on declining balance, and on the 1952 returns at the straightline rate of 3%. There was no evidence that an application had been made to the Director of Internal Revenue for permission to change depreciation methods.

4. A prior auditors' report dated October 2, 1953, listed a detailed schedule of "Reclassification of Janitors' and Cleaning payrolls" covering the period August 1, 1951, to August 31, 1953, showing that substantial amounts should have been capitalized. Also was included a schedule analyzing the account "Repairs, Material" which indicated that the "greater portion of this material went into new assets that should have been capitalized or been charged back to the general contractor." Neither of these adjustments had been entered in the books.

5. Test checking into support for some of the above-listed items disclosed many invoices could not be found, and hence it would be impossible to make a detailed Certified Audit Report.

6. The only capital stock recorded in the general ledger is \$100.00 preferred stock. I am informed

there were also initially issued 3 shares of common stock, and later on an additional 900 shares.

After discussion of the above factors you authorized me to make major adjustments as between years, to record prior auditors' findings not previously entered in the records, and to prepare amended Federal and Territorial Income Tax Returns for 1951 and 1952 as well as prepare 1953 returns.

Accordingly, I have made, in addition to many small adjustments, the following major adjustments:

A. Adjusted from 1952 to 1951 a prior auditor's adjustment No. 1 made April 30, 1952, "effective in 1951," recorded by Journal Entry "J21A," charging \$75,305.00 to "Payable Nelse Mortensen Alaska, Inc.," and crediting building costs to reduce recorded costs down to contract price of \$3,080,000.00.

B. Adjusted from 1953 to 1951 a prior auditor's adjustment made as of August 31, 1953, charging \$31,612.00 to "Payable Nelse Mortensen Alaska, Inc.," and crediting "Surplus" for "property taxes for 1951 during Construction." Also entered from same auditor's adjustments of August 31, 1953, the following, all of which were charged by the auditor to Nelse Mortensen Alaska, Inc.:

Transferred to 1951:

Interest on mortgage.....	\$9,075.26
Insurance on mortgage.....	5,775.00

Transferred to 1952:

Interest on mortgage.....	\$9,225.01
Insurance on mortgage.....	1,925.00
Real and personal property taxes.....	3,616.67

All of these adjustments had been credited to 1953 expense accounts, although applicable to years shown above.

C. Recorded prior auditor's adjustments contained in schedules mentioned under Item 4 above.

D. Segregated "Power Plant" and "Maintenance Shop" from other asset and expense accounts to more clearly show the nature of the assets.

E. Adjusted Depreciation for 1952 and 1953 back to 5% same as 1951.

F. Assisted your bookkeeper make other adjusting and closing entries for 1953. She is now in a position to proceed with entering 1954 business, and it is felt she is qualified to enter it correctly so there will be no need for such major adjustments in the future as have been necessary this time.

It will be noted that no new adjustments have been made to the Nelse Mortensen-Alaska, Inc., account, nor has any common stock been set up, as it is understood these, among other things, are subject to a current lawsuit. Hence these items will be adjusted as required after such suit is settled.

In view of the above situation, no statements are being submitted at this time and an extension has been obtained for filing your Federal and Territorial

Income Tax Returns, as it is deemed advisable to defer such items rather than to issue them when known to have such major items in dispute. Also, to issue a Corporation Balance Sheet without showing any ownership, that is, common stock, certainly would seem incomplete.

Your attention is again called to the fact that no certified audit of your records has been made, and, in fact, it would probably be impossible to do so. However, after your lawsuit is settled, and the items in dispute are determined, it will be possible to make the necessary adjustments and resulting statements that will then have some value.

Very truly yours,

/s/ KENNETH D. GILLANDERS.

KDG:mc

cc: mlk

Receipt of Copy acknowledged.

[Endorsed]: Filed April 3, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on duly and regularly for hearing on the motion of the defendants, Cash Cole and Bayview Realty, Inc., filed in the above-entitled cause on or about January 8, 1954, pursuant to Rule 60 of the Federal Rules of Civil Pro-

cedure, to set aside the stipulation of the parties filed in said cause on October 9, 1953, and vacate the final judgment entered thereon on October 10, 1953, and for leave to file a cross-complaint or counterclaim lodged with this court; and further upon the amended motion of the plaintiffs, Fairview Development, Inc., an Alaska Corporation, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., for the appointment of a receiver to take over the management and operation of Fairview Manor Apartments and all other property and assets and income of said plaintiff corporation, Fairview Development, Inc., which motion was filed in the above cause on March 19, 1954; and further upon the motion filed February 13, 1954, by the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of said final judgment entered October 10, 1953, and the settlement agreement evidenced by said stipulation filed October 9, 1953, or in the alternative for the entry of an order directing said Cash Cole and Bayview Realty, Inc., to assign and deliver the certificates evidencing the capital stock of the plaintiff corporation issued in their name, or names, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson; and the plaintiffs in the above-entitled cause being

represented by their attorneys, Joe Diamond and Earle Zinn, and Collins and Clasby, by Walter Sczudlo, and the defendants being represented by their attorneys, Bell & Sanders and Warren A. Taylor, by Warren A. Taylor, at said hearing and argument on said motions; and the court having considered the settlement agreement embodied in said stipulation filed in this cause on October 9, 1953, and the final judgment and decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, and the various proceedings and the trial had in this cause, and the affidavits filed by said defendants Cash Cole and Bayview Realty, Inc., in support of their said motion above mentioned and in opposition to plaintiffs' motions, and the various affidavits filed by the plaintiffs in opposition to said motion of defendants and in support of their motions for a receiver or to show cause hereinbefore mentioned, and all the pleadings and proceedings heretofore had herein, and having heard statements of counsel and their arguments and being otherwise fully advised in the premises, makes the following:

Findings of Fact

1. This was in the nature of a stockholders' suit filed by the plaintiff corporation and owners of 50 per cent of its common stock to secure appointment of a receiver and an accounting from the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and, if necessary, to wind up said corporation.

for the following reasons, among others: Existence of an impasse in the conduct of its corporate affairs due to deadlock and dissension in the Board of Directors and among the stockholders; dissension and discord as to who, in fact, comprise the directorate; improper disposition of corporate funds; dissipation of corporate assets; impairment of corporate property; and usurpation of control and possession of corporate assets, income and profits by the defendants, owners of the other 50 per cent of the common stock, and exercise by them of corporate powers without the authority of the Board of Directors and the stockholders, contrary to the provisions of the corporate charter, bylaws and the General Laws of the Territory of Alaska.

2. The principal defendants, Cash Cole (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.); Everett Nowell (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.); and Bayview Realty, Inc., filed an answer in the nature of a general denial.

3. The trial commenced on October 5, 1953, and continued during that day, including the taking of the testimony of Cash Cole on direct examination as an adverse witness for the plaintiffs. That evening he purportedly suffered a heart attack, and the trial was continued from day to day until the entry of the final judgment, except for the taking of the testimony of Arnoldine Scott. Negotiations were im-

mediately undertaken for the purpose of settling the various claims of the parties involved in this case, other pending litigation between them, and the case filed by A. G. Rushlight & Co., No. 7163, to foreclose its mechanic's lien against Fairview Manor.

4. On October 8, 1953, Robert E. Sheldon was appointed as receiver in this cause for the Fairview Manor and all the assets of the corporate plaintiff, in view of the lack of any settlement on that date, the probable indefinite continuance of the trial, and the purported illness of Cash Cole.

5. A written stipulation settling all claims of the parties in this case was executed by them October 9, 1953, providing, among other things: (a) For sale of the common stock owned by the Mortensens and Henderson to Cash Cole; (b) release of all claims against Cash Cole and Fairview Development, Inc., by the Mortensen group in consideration of the payment of \$89,000.00 by Fairview Development, Inc., payable \$6,800.00 at the time of execution, \$3,200.00 on December 31, 1953, and thereafter \$5,000.00 quarter annually; (c) security for performance by said Fairview Development, Inc., of said agreement to pay by deposit in escrow of all of the common stock then owned or acquired through the settlement by Cash Cole, Everett Nowell, and Bayview Realty, Inc., such stock in the event of default to become the property of the Mortensens and Henderson in satisfaction of said sum of \$89,000.00; (d) payment by the Mortensen group to Nowell of

a claim of \$6,800.00, and dismissal of litigation involving said claim; (e) assumption by the Mortensen group of responsibility for claims of mechanic's liens by Pilip & Butt Painting Contractors, Inc., and C. H. Keaton involved in the above-mentioned case No. 7163; (f) release to the Mortensen group of approximately \$8,800.00 held on deposit at the National Bank of Commerce in Seattle; (g) dismissal of all pending litigation with prejudice; (h) resignation of Mortensen and Henderson as officers and directors; (i) agreement for no change in the corporate articles of the plaintiff corporation, or incurrence of any unusual debts until payment of said sum of \$89,000.00; (j) approval of the stipulation by court; (k) and execution of such other documents as might be subsequently required to consummate terms of said settlement. At the same time a separate settlement agreement was made with A. G. Rushlight & Co., of its claim in case No. 7163, and filed in the form of a stipulation providing payment of \$125,000.00 by the Mortensen group to said claimant. A final judgment approving the settlement filed in this cause was entered on October 10, 1953, by this court and provided for discharge of the receiver and the carrying out of the terms and provisions of the agreement contained in said stipulation.

6. On January 8, 1954, the defendants, Cash Cole and Bayview Realty, Inc., filed a motion to set aside said stipulation and vacate said judgment under Rule 60 (b) of the Federal Rules of Civil

Procedure upon the following grounds: (a) Fraud; (b) mental incapacity of Cash Cole as a result of heart attack; (c) mistake, inadvertence, surprise, excusable neglect; (d) conspiracy to defraud by the Mortensens, Henderson, Nowell, and W. A. Rushlight; (e) stipulation and decree is unconscionable, impossible of performance and confiscatory; (f) no authority by boards of stockholders to execute stipulation; (g) separate agreements made with Nowell and Rushlight were without consideration; and (h) no ratification of stipulation by Cash Cole. In support of said motion various affidavits have been filed by defendant Cash Cole, and by Tom Cole and Mrs. Ruth Cole.

7. On February 13, 1954, the Mortensens moved for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of the final decree entered October 10, 1953, and the settlement agreement evidenced by the stipulation filed October 9, 1953, and for failure to deliver the capital stock of plaintiff corporation as provided in said decree and stipulation, or in the alternative that an order be entered directing them to assign and deliver the certificates evidencing said stock to the Mortensens and Henderson. An amended motion was likewise filed March 19, 1954, for reinstatement of Robert E. Sheldon as receiver in this case or for appointment of some other disinterested person as receiver to take over the management of Fairview Manor Apart-

ments and the assets of the plaintiff corporation, until said defendants have complied with the terms and provisions of said final decree and stipulation. Affidavits in opposition to defendants' motion to vacate and in support of the motions to show cause and for appointment of receiver have been filed by the plaintiffs Cliff Mortensen and Frank V. Henderson, and by Joe Diamond, Earle Zinn, Everett Nowell, W. A. Rushlight, and Dr. Joseph M. Ribar.

8. A notice of default and demand executed by the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, dated February 9, 1954, and filed herein on February 13, 1954, was served on defendants, showing their defaults under the settlement agreement, and termination of ownership thereby in stock pledged as security.

9. Negotiations to compromise the conflicting claims of the parties involved in this cause, as well as the claim of A. G. Rushlight & Co., were undertaken at the suggestion of Nicholas Jaureguy, attorney for Cash Cole, and W. A. Rushlight, immediately after the trial was continued on October 6, 1953. The negotiations for settlement were conducted by Nicholas Jaureguy, as attorney for Cash Cole and Bayview Realty, Inc.; John Hedrick, Attorney for Everett Nowell; W. A. Rushlight, acting as representative for A. G. Rushlight & Co.; Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, and Fairview Development, Inc., and other plaintiffs. The following attorneys appeared

of record for the defendants at the time of the trial and negotiations: Cake, Jaureguy & Hardy of Portland; Morrissey, Hedrick, Roberts & Dunham of Seattle; and J. Hellenthal of Anchorage. These several attorneys represented independent of each other the respective conflicting claims of the parties to this cause and conducted personally the negotiations. Nowell, Mortensen and Henderson personally participated in said negotiations. Cash Cole participated in them through his attorney, Jaureguy, and said Rushlight, and the various compromise plans were submitted from time to time to him personally.

Several compromise plans were considered, containing the basic provisions embodied in the ultimate settlement evidenced by the stipulation, filed in this cause on October 9, 1953. Jaureguy, Cash Cole, and Rushlight gave careful consideration to the compromise plan for the purpose of: Purchasing the interests of the Mortensens and Henderson so as to gain control of Fairview Development, Inc., and Fairview Manor; settling the various claims of said parties against each other; securing the discharge of Robert E. Sheldon, receiver then recently appointed in this case; securing dismissal of other litigation pending between these parties; avoiding further trial in this case; and securing payment of the claims of lien of A. G. Rushlight & Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton. The interests of these various groups in this case were adverse to each other, and each group person-

ally or through its attorneys, conducted the negotiations independently for its own benefit, without misrepresentation, or opportunity for fraud, or attempt to overreach Cash Cole or any other parties involved for its own advantage, since all phases of said negotiation and proposed settlement were known to each of said groups, and to Cash Cole, his son (Tom Cole), his wife, and Jaureguy, his attorney, who had full possession of all the facts and all of the corporate books of Fairview Development, Inc., during this entire period.

10. The several compromise plans considered during the negotiations were reciprocal in nature in that the Mortensens and Henderson were willing "to buy or sell" on the same terms and conditions, that is, to buy out the interests of the principal defendants in the plaintiff corporation and settle all conflicting claims, or to sell their interests in the plaintiff corporation to the principal defendants and to settle all conflicting claims. The final compromise evidenced by the stipulation filed October 9, 1953, in this case, was a similar "to buy or sell" offer, which Cash Cole elected to accept as a buyer.

11. Cash Cole contends that his wife and Tom Cole were uninformed of the matters discussed and the final stipulation. In his later affidavit he points out discussions between Tom Cole and W. A. Rushlight in which familiarity with the terms of the stipulation are shown by the former. Tom Cole denied participation in the negotiations, but admitted that he talked to W. A. Rushlight and to

Jaureguy, attorney for Cole, about the final settlement agreement. He does not deny in his affidavits lack of knowledge as to the terms and conditions of the final settlement represented in the stipulation. Ruth Cole denies participation in the negotiations, but does not deny knowledge of the final settlement terms, but rather indicates that she did possess such knowledge. Plaintiffs' affidavits do not contain any such conflicting representations, but unequivocally state that both Mrs. Cole and Tom Cole, as well as their attorney Jaureguy and W. A. Rushlight, had full knowledge of all of the negotiations and especially the terms and conditions of the final compromise plan embodied in the stipulation, which they now seek to set aside.

12. Dr. Joseph M. Ribar attended Cash Cole following his purported heart attack at the end of the first day of the trial. The doctor merely stated that at no time within one week after said attack was Cash Cole in a proper physical or mental condition to transact business matters, and admitted that he was unable to state as to whether Cole was mentally competent to transact any business matters after the expiration of 72 hours following his attack, that is, after October 7, 1954, since the patient was not examined to determine his mental competency. Rushlight states in his affidavit that Cash Cole was fully aware of what was going on and understood each and every matter contained in the stipulation and all ancillary matters. He further states that he

was advised of the progress of the negotiation and terms of the compromise plan not only by himself but likewise by his attorney Jaureguy.

The affidavits submitted on behalf of defendants Cash Cole and Bayview Realty, Inc., to vacate the decree contained conflicting statements with respect to his comprehension and capacity. Cash Cole, in his affidavit, states that he did not ascertain the intent and import of said stipulation until about one month after the execution thereof. Tom Cole in his affidavit states, on the other hand, that it was "several days after the agreements and notes were signed" before Cash Cole ascertained the nature thereof. Ruth Cole in her affidavit states that Rushlight discussed with Cash Cole for several days the settlement negotiations, but at page 2 thereof states that it was "several weeks" after the stipulation was signed before he knew what it contained. Cash Cole swears in his affidavit that he was unable to read the stipulation for a period of one month after he signed it, because of the drugs administered to him. Dr. Ribar, however, states that the effect of said drugs was limited to approximately 72 hours after their administration, and that such effect would not continue for one month. Tom Cole in his affidavit admits that Cole could read after a week.

13. In support of the motion seeking to vacate the final judgment on the ground of fraud and conspiracy, the principal defendants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions as follows: That plaintiffs

“acting in concert with one W. A. Rushlight” induced him to sign the stipulation, when he did not know the contents thereof; that Cash Cole relied on a false and fraudulent statement as to the contents of said stipulation made by “A. G. Rushlight Co.”; that he “believes” that the Mortensens and Henderson, Rushlight, and Nowell conspired to secure his stock in the plaintiff corporation, knowing that he could not make the payments provided in the stipulation, demand note and agreement (apparently the demand note was the one to Rushlight and the agreement was the one with Nowell, neither of which had any place in the stipulation involved in this cause); that Mortensen, Henderson and Nowell, acting in concert with Rushlight began negotiations with Cash Cole to sell their stock to Cole; that it was evident to Cash Cole that the “plaintiffs had concocted a scheme” to secure not only the profits from contracts of construction, but also over \$1,000,000.00 by failing to do the work, etc.; and that reading of Nowell’s letter of May 24, 1951, criticizing actions of Cash Cole, made it clear to Cash Cole that Nowell’s responsibilities as a director in Bayview Realty, Inc., and Fairview Development, Inc., were secondary to his personal affairs.

The other parties to the negotiations deny any such conspiracy, fraud or other charges and in their affidavits set up the ultimate facts leading up to the settlement and said stipulation as hereinabove indicated. At all times the Mortensens and Henderson were willing to buy the interests of the principal

defendants and settle all claims on the same terms and conditions as those contained in the final settlement agreement contained in the stipulation.

14. Cash Cole admits that the reason for failure to perform the settlement agreement and make the payments required thereunder was due to the 55 or more vacancies since November, 1953. Apparently this is the only reason for the statement in the motion to vacate the judgment and in the prior affidavit of Cash Cole that said settlement agreement was impossible to fulfill, and so was confiscatory or in the nature of a forfeiture of his interests. In the affidavit filed by Tom Cole the alleged impossibility of performance of the stipulation involved in this cause is tied in with the separate agreements made with Cash Cole, Nowell and Rushlight which were not involved in said stipulation and were not a part thereof.

15. Cash Cole accepted the benefits of the performance of the terms and conditions of the settlement agreement by the Mortensens and Henderson resulting in the dismissal of various litigation hereinafter mentioned, payment by them of \$125,000.00 to A. G. Rushlight & Co., in case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Contractors, Inc., and release and settlement of other conflicting claims. No restitution has been offered by Cash Cole and Bayview Realty, Inc., or others in their behalf, to place the parties in the same position as they were at the

time of the filing of said stipulation on October 9, 1953.

16. The following claims of mechanic's and materialman's liens had been filed, and foreclosure thereof was sought in case No. 7163, filed against Fairview Development, Inc., Nelse Mortensen-Alaska, Inc., and others, by A. G. Rushlight and Co.

(a) A. G. Rushlight and Co., Inc.—Claim, \$344,973.30; attorneys' fees, \$35,000.00; and costs.

(b) Pilip & Butt Painting Contractors, Inc.—Claim, \$77,681.62, and interest accrued thereon; attorneys' fees, \$5,000.00; and costs.

(c) C. H. Keaton, d/b/a Keaton Paint Co.—Claim, \$17,349.44, and interest accrued thereon; attorneys' fees, \$2,000.00; and costs.

W. A. Rushlight would enter into no settlement of said Rushlight lien unless a settlement was likewise made with Cash Cole on terms and conditions acceptable to said Cash Cole. The stipulation filed in the subject case provided for assumption by the Mortensens and Henderson of said liens. Simultaneously with the filing of said stipulation, a stipulation was likewise filed in case No. 7163 by the Rushlight Company and Mortensens and Henderson agreeing to the payment of \$125,000.00 in settlement of the Rushlight lien. Payment was thereafter made and an order was entered on November 20, 1953, dismissing the amended complaint of the Rushlight Company. On February 16, 1954, a stipulation was filed wherein Pilip & Butt Painting Contractors, Inc.,

certified to the settlement and payment of its claim and an order was entered on that date dismissing the cross-complaint of said claimant in said case.

17. At the time of the trial, settlement and final decree in this case the following additional litigation was pending and subsequently settled by reason of said stipulation and performance thereof by the Mortensens and Henderson:

(a) A. G. Rushlight and Co., a corporation, vs. Nelse Mortensen-Alaska, Inc., a corporation, Fairview Development, Inc., et al., No. 7163, foreclosure proceedings above mentioned.

(b) Nelse Mortensen-Alaska, Inc., a corporation, et al., vs. A. G. Rushlight and Co., a corporation, No. 3105, in the District Court of the United States for the Western District of Washington, Northern Division.

(c) Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners, d/b/a Nelse Mortensen-Alaska Co., et al., vs. Pilip & Butt, Inc., a corporation, et al., No. 44280, in the Superior Court of the State of Washington for King County.

(d) Fairview Development, Inc., a corporation, vs. Nelse Mortensen-Alaska, Inc., No. 3532, in the District Court of the United States for the Western District of Washington, Northern Division, for damages in the sum of \$699,912.27, sought against the Mortensen Construction Company based upon exaggerated and groundless claims.

18. The settlement agreement contained in the stipulation (par. 2, 9) provided that all of the capital stock of Fairview Development, Inc. (except the 100 shares of preferred stock), consisting of 450 shares purchased by said Cash Cole, Nowell and/or Bayview Realty, Inc., from the Mortensens and Henderson under said agreement, and the 450 shares of stock owned by Bayview Realty, Inc., would be placed in escrow, as security for the payment of the sum of \$89,000.00 to the Mortensens and Henderson undertaken by Fairview Development, Inc. It was understood under said settlement agreement that all of said voting stock would remain in escrow so that in the event of any default the Mortensens and Henderson would be entitled to all of said stock as their own property, except said 100 shares of preferred stock. Cash Cole, Nowell and Bayview Realty, Inc., failed to deliver said stock in escrow for the purpose of said security.

19. Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have fully performed all the terms and conditions of the settlement agreement, including: (a) Payment of \$125,000.00 to A. G. Rushlight & Co., in settlement of its claim in case No. 7163; (b) dismissal on November 20, 1953, of the Rushlight amended complaint; (c) settlement of the claim of Pilip & Butt Painting Contractors, Inc., and payment thereof; (d) making provision for defending against the claim of C. H. Keaton without cost to Fairview Development, Inc.; (e) securing dismissal of other suits pending in the State

of Washington hereinabove mentioned; and (f) payment to Nowell of \$6,800.00 under stipulation (par. 3).

20. Bayview Realty, Inc., Cash Cole and Nowell have defaulted under the stipulation and settlement agreement in the performance of the terms and conditions thereof, including: (a) failure to deposit all the capital stock of Fairview Development, Inc. (except 100 shares of preferred stock), aggregating 900 shares theretofore owned by said defendants or one or more of them, or acquired under the terms of the settlement agreement, as security for the payment of the obligation of \$89,000.00 undertaken by Fairview Development, Inc.; (b) failure to pay \$6,800.00 at time of execution of settlement agreement and stipulation; (c) failure to pay \$3,200.00 on or before December 31, 1953; (d) refusal to permit Fairview Development, Inc., to pay said sum of \$89,000.00, the maturity of which was accelerated by Notice of Default and Demand, dated February 9, 1954, filed in the above cause February 13, 1954.

21. The various affidavits of the parties contain references or statements in connection with the motion of said defendants to set aside said stipulation and vacate said final judgment with respect to the income of Fairview Manor Apartments, the plaintiffs' knowledge concerning the financial condition of Fairview Manor Apartments, the separate negotiations and settlement made between the defendants Cash Cole and Everett Nowell, the execution by Cash Cole of a note in apparently the sum of

\$25,000.00 to Rushlight, and business transactions between the defendants Cash Cole and Everett Nowell. These references are to matters which are not relevant to the issues raised by said motions.

22. The defendants Cash Cole and Bayview Realty, Inc., have reiterated claims upon which the suit hereinabove mentioned bearing No. 3532 filed in the District of the United States for the Western District of Washington, Northern Division, was based. The suit was dismissed with prejudice and upon stipulation of parties thereto. Said suit sought damages for \$699,912.27. It was based on excessive and unreasonable claims involving purported defects in construction which actually resulted from defective plans and specifications prepared by an architect selected by Cole, and from changes connected with the progress of construction, which were required and authorized by the plaintiff corporation. The total amount actually in dispute did not exceed the maximum sum of \$20,000.00. The cross-complaint lodged with this court by said defendants covers substantially the same claims which said defendants contend were shortages under the construction contract performed by the Mortensen company. All of these claims and counter-claims were the subject of the settlement involved in this case and were mutually released by the parties hereto. They were also all involved in said case No. 3532, and by stipulation said case was dismissed October 28, 1953, with prejudice. (A certified copy of the complaint in said case and said stipulation and order

were filed with this court at the time of the oral argument on April 3, 1954.)

23. The purpose of this suit filed by the plaintiffs was to resolve the deadlock in the conduct and the affairs of the plaintiff corporation, due to the failure of the board of directors to proceed, to resolve the deadlock among the stockholders and members of said board resulting in paralysis of corporate functions, to end the dissension and discord in said board, to eliminate mismanagement and improper disposition of funds and dissipation of assets and impairment of corporate property by the principal defendants. The proceedings at the trial and the deposition taken theretofore of Cash Cole, and the affidavits filed herein showed many improper acts in management by Cash Cole and members of his family and Nowell: (a) Purchase of auto parts out of funds of the plaintiff corporation for Tom Cole; (b) improper payment of monthly salary of \$1,000.00 to Nowell while he was employed full time by the Alaska Freight Lines in Juneau; (c) sending the daughter-in-law of Cash Cole on an extensive trip to the United States and for her personal benefit at the expense of the plaintiff corporation; (d) expenditure of corporate funds for excessive long distance phone calls; (e) payment out of corporation funds for vacation of Cole and members of his family; (f) furnishing of a free apartment and bar for Nowell, which he only occasionally used, but was always available; (g) apartments made avail-

able to members of Cole's family free of rent; (h) exorbitant and unauthorized salaries paid to Cole and Nowell; (i) inefficient management generally and numerous family members of Cash Cole on the payroll; and (j) unauthorized control, failure to account, lack of stockholders' annual meetings and meetings of board of directors, and usurpation of the operation and management of Fairview Manor by the defendants, and dissipation of the assets and funds of the plaintiff corporation.

From the foregoing findings of fact the court makes the following:

Conclusions of Law

I. The defendants, Cash Cole and Bayview Realty, Inc., have failed to sustain any ground under Rule 60 (b) of the Federal Rules of Civil Procedure on which this court can set aside or rescind the stipulation filed October 9, 1953, and executed by the parties hereto, containing their settlement agreement, or vacate the final judgment and decree entered herein.

II. The burden of proving fraud, mental incapacity or any of the other grounds set up in defendants' motion is on them. Fraud, conspiracy, mental incapacity or other grounds alleged cannot be presumed, but must be proved by clear and convincing evidence. The affidavits and the statement of facts contained therein filed by the defendants in support of their motion are legally insufficient to sustain said burden of proof. Said affidavits are fre-

quently argumentative, contain conclusions of fact and not statement of ultimate facts, are conflicting as to matters stated by members of the Cole family, contain considerable duplicity, frequently make assumptions without factual basis or contain legal conclusions, and contain many immaterial matters not pertinent to the issues before this court under said motion of defendants and the motions of the plaintiffs.

III. There is no clear, unambiguous, and convincing proof of fraud, conspiracy, or any of the other acts charged in the motion to rescind the stipulation of the parties filed on October 9, 1953, and to vacate the final judgment.

IV. There is no clear, cogent and convincing proof that at the time of the execution of said stipulation and settlement agreement embodied therein sought to be rescinded by said defendants, that said Cash Cole was mentally incompetent. He knew the nature, character, and effect of his execution of the stipulation and understood the subject matter thereof and the transactions covered by said stipulation.

V. The plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, have completed performance of the terms and conditions of the settlement agreement contained in said stipulation and the final judgment entered thereon but the defendants have not. It is inequitable to rescind said stipulation and the settlement agreement contained

therein and to vacate said final judgment and decree entered thereon without restoring the plaintiffs to their status quo at the time of the execution of said stipulation which said defendants have not offered to do.

VI. The defendants Cash Cole and Bayview Realty, Inc., have affirmed or ratified the settlement agreement contained in said stipulation by failing to disaffirm it without delay from October 9, 1953, and by accepting benefits thereunder until January 8, 1954, when their said motion was filed in this case.

VII. The cross-complaint lodged with this court and which said defendants request leave to file herein and which attempts do include Fairview Development, Inc., as a claimant, covers various purported defects in construction which were substantially the subject matter of case No. 3532 filed by Fairview Development, Inc., against Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, in the District of the United States for the Western District of Washington, Northern Division. All of said claims raised in said complaint are res adjudicata by reason of a final decree entered in said case No. 3532 dismissing said case with prejudice.

VIII. A receiver should be appointed to preserve the assets of Fairview Development, Inc., to collect its income and to protect the interests of the stockholders thereof, until such time as the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V.

Henderson have obtained possession of the capital stock of the plaintiff corporation, have elected a board of directors and officers of said corporation, and have succeeded in bringing up to date all of the corporate records of said corporation so that the interests of all stockholders and creditors of said corporation have been protected.

IX. That under the terms and provisions of the settlement agreement contained in said stipulation filed October 9, 1953, herein, and by reason of the defaults in the performance of the terms and agreements undertaken by the principal defendants, said Cash Cole, Everett Nowell, and Bayview Realty, Inc., the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, are now the owners of and entitled to the 450 shares of stock now appearing in the name of Cash Cole, Bayview Realty, Inc., and Everett Nowell, or one or more of them, as well as the additional 450 shares of stock heretofore or now appearing in the name or names of said individual plaintiffs, and said defendants Cash Cole, Bayview Realty, Inc., a corporation, and Everett Nowell, or one or more of them, and Roy Sumpter, their employees, agents, attorneys and representatives, should be directed to endorse and/or deliver to said individual plaintiffs the certificate or certificates of stock of Fairview Development, Inc., evidencing 900 shares appearing in whole or in part in their name, or one or more of them, or in the name or names of said individual plaintiffs.

Done and Entered this 7th day of May, 1954.

/s/ HARRY E. PRATT,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANTS' MOTION
TO VACATE FINAL JUDGMENT; AP-
POINTING RECEIVER; AND DIRECTING
DELIVERY OF CERTIFICATES OF
STOCK

This Matter having come on duly and regularly for hearing on the motion of the defendants, Cash Cole and Bayview Realty, Inc., filed in the above-entitled cause on or about January 8, 1954, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to set aside the stipulation of the parties filed in said cause on October 9, 1953, and vacate the final judgment entered thereon on October 10, 1953, and for leave to file a cross-complaint or counter-claim lodged with this court; and further upon the amended motion of the plaintiffs, Fairview Development, Inc., an Alaska Corporation, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., for the appointment of a receiver to take over the management and op-

eration of Fairview Manor Apartments and all other property and assets and income of said plaintiff corporation, Fairview Development, Inc., which motion was filed in the above cause on March 19, 1954; and further upon the motion filed February 13, 1954, by the plaintiffs Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of said final judgment entered October 10, 1953, and the settlement agreement evidenced by said stipulation filed October 9, 1953, or in the alternative for the entry of an order directing said Cash Cole and Bayview Realty, Inc., to assign and deliver the certificates evidencing the capital stock of the plaintiff corporation issued in their name, or names, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson; and the plaintiffs in the above-entitled cause being represented by their attorneys, Joe Diamond and Earle Zinn, and Collins and Clasby, by Walter Sczudlo, and the defendants being represented by their attorneys, Bell & Sanders and Warren A. Taylor, by Warren A. Taylor, at said hearing and argument on said motions; and the court having considered the settlement agreement embodied in said stipulation filed in this cause on October 9, 1953, and the final judgment and decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, and the various proceedings and the trial had in this cause, and the affidavits

filed by said defendants Cash Cole and Bayview Realty, Inc., in support of their said motion above mentioned and in opposition to plaintiffs' motions, and the various affidavits filed by the plaintiffs in opposition to said motion of defendants and in support of their motions for a receiver and to show cause hereinbefore mentioned, and all the pleadings and proceedings heretofore had herein, and having heard statements of counsel and their arguments and being otherwise fully advised in the premises; and the Court having entered heretofore its findings of fact and conclusions of law.

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That the motion of said defendants, Cash Cole and Bayview Realty, Inc., a corporation, filed in the above-entitled cause on or about January 8, 1954, pursuant to Rule 60 of the Federal Rules of Civil Procedure, to set aside or rescind the stipulation of the parties filed in this cause on October 9, 1953, and vacate the final judgment and decree entered herein on October 10, 1953, be and it is hereby denied.

2. That the motion of said defendants included within the above and foregoing motion to set aside said stipulation and vacate said final judgment and decree, for leave to file an amended answer and cross-complaint to plaintiffs' complaint, be and it is hereby denied.

3. That the amended motion of the plaintiffs,

Fairview Development, Inc., an Alaska corporation, Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, individually and as stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., filed herein on March 19, 1954, for the appointment of a receiver to take over the management and operation of Fairview Manor Apartments and all other property and assets of the plaintiff corporation, Fairview Development, Inc., and to collect all its income and receipts, be and it is hereby granted.

4. That the motion filed February 13, 1954, by the plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, for the entry of an order directing the defendants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of said final judgment entered October 10, 1953, and the settlement agreement evidenced by said stipulation filed October 9, 1953, or in the alternative for the entry of an order directing said Cash Cole and Bayview Realty, Inc., to assign and deliver the certificates evidencing the capital stock of the plaintiff corporation issued in their names, or name, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, be and it is hereby granted as hereinafter more fully provided.

5. That Robert E. Sheldon of the City of Fairbanks, Alaska, be and he is hereby appointed re-

ceiver for the property involved in the above-entitled cause, and all assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon, and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; that said receiver shall enter into possession immediately of the property hereinbefore mentioned and collect and preserve the rents, issues and profits thereof; that upon entering upon his duties said receiver shall file with this court a bond in the penal sum of \$50,000.00 as security, to be approved by this court, and conditioned upon the faithful performance of his duties as such receiver.

6. That any party or parties now in possession of said premises, or any portion or portions thereof, or that may come into possession of said premises and the improvements thereon, or any portion or portions thereof, attorn to said receiver.

7. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., and each of them, their heirs, special representatives, successors, assigns, agents, attorneys, employees and any representatives whatsoever, be and they are hereby removed and disassociated from all management or operation, or any aspects thereof, of Fairview

Manor Apartments, or any other matter relating to said project, or to the affairs of the plaintiff corporation, Fairview Development, Inc., and said defendants, and each of them be and they are hereby directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation or with said corporation itself; that the present directors and officers of said Fairview Development, Inc., except Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, and each of said directors and officers be and they are hereby directed and enjoined not to interfere with the management and operation of said Fairview Manor Apartments and the property of said plaintiff corporation by said receiver but are directed and enjoined to forthwith surrender all said property and all the corporate books and records to said receiver without delay, including all bank deposits and other assets of said plaintiff corporation, Fairview Development, Inc.

8. That the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc., a corporation, and each of them, Roy Sumpter of Seattle, Washington, their heirs, special representatives, successors, assigns, agents, attorneys, employees, and any representative whatsoever, be and they are hereby directed and enjoined to deliver within 20 days from the date hereof the certificate or certificates of stock issued by said plaintiff corporation, Fairview Development, Inc., to said Cash Cole, Everett Nowell, and Bayview Realty, Inc., or one or more of them,

evidencing 450 shares of capital stock of said corporation, and any other certificate or certificates for an additional 450 shares of stock of said corporation heretofore or now appearing in the name of one or more of said individual plaintiffs, to said plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson without delay, conveying thereby all their right, title and interest in and to said capital stock in payment and satisfaction of the obligation, which said defendants Cash Cole, Everett Nowell, and Bayview Realty, Inc., agreed to secure in said stipulation; and said Fairview Development, Inc., be and it is hereby directed to cancel said certificate or certificates of stock and to issue in lieu thereof for said shares of capital stock a new certificate to said Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson. Said Roy Sumpter is hereby further directed and enjoined to deliver any other certificate or certificates of stock held by him evidencing shares of capital stock issued to any one or more of the plaintiffs including said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, without delay.

Entered and Done this 7th day of May, 1954.

/s/ HARRY E. PRATT,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered May 7, 1954.

[Title of District Court and Cause.]

**MOTION TO STRIKE NAME OF FAIRVIEW
DEVELOPMENT, INC., AS PARTY PLAINTIFF**

Comes Now Cash Cole, individually and as a stockholder of Fairview Development, Inc., and stockholder and President of Bayview Realty, Inc., and moves this Honorable Court for an Order striking from the title the name of Fairview Development, Inc., as party plaintiff, in the above-entitled action, upon the following grounds:

1. That the said corporation, Fairview Development, Inc., did not at any time by its Board of Directors, authorize or empower Cliff Mortensen, Frank A. Henderson or Nelse Mortensen to employ counsel to act for and on behalf of the said corporation in cause No. 7298 on file herein.

2. That at no meetings of the Board of Directors mentioned in plaintiffs' Complaint did plaintiffs utilize the services of Kenneth Kadow or Roy Sumpter, the arbitrators provided by the parties hereto.

3. That in the Complaint on file herein there is an allegation that in case of a deadlock in the Board of Directors that the final decision in the matters over which the Directors are deadlocked shall be determined by Kenneth Kadow, or in his inability to act, by Roy Sumpter, of Seattle, Washington, but there are no allegations that the plaintiff members of the Board of Directors called upon the said Ken-

neth Kadow or Roy Sumpter to exercise their right as arbitrators in any matter whatsoever.

4. That the said corporation, Fairview Development, Inc., did not adopt any resolution or motion or take any action in regard to employment of the law firm of Collins and Clasby, Fairbanks, Alaska, to institute an action for and on behalf of Fairview Development, Inc., and against the defendants herein named.

Dated at Fairbanks, Alaska, this 9th day of June, 1954.

/s/ WARREN A. TAYLOR,
Of Defendants' Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

ORDER

No. 7298

The plaintiffs were represented by Walter Sczudlo; the defendant, Cash Cole, by Eugene V. Miller.

Respective counsel had argument on the above-named defendant's motion to strike the name of Fairview Development, Inc., from the title in this cause.

It was Ordered that the motion be denied.

* * *

Entered June 17, 1954.

[Title of District Court and Cause.]

NOTICE OF HEARING

Notice Is Hereby Given that on the 4th day of June, 1954, at the hour of 1:00 o'clock in the afternoon, or as soon thereafter as the same may be heard, the court will be requested to set a bond for costs, or supersedeas bond, or both pursuant to Rules 73(c) and 73(d) of the Federal Rules of Civil Procedure, or to strike or dismiss the notice of appeal heretofore filed on or about May 10, 1954, by certain defendants, in the courtroom usually occupied by the court at the courthouse, Fairbanks, Alaska. At which time and place you may appear if you see fit.

COLLINS AND CLASBY,

By /s/ WALTER SCZUDLO,

Of Counsel for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

ORDER

Whereas, heretofore on May 7, 1954, this court entered an order, which, among other things, appointed Robert E. Sheldon of the City of Fairbanks, as receiver for the property involved in the above-entitled cause, and all the assets and corporate records of the plaintiff corporation, Fairview Develop-

ment, Inc., and its business, together with all improvements located thereon, and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; and it appears and the court finds that said receiver on the same day filed his written oath herein and accepted said appointment, and heretofore filed herein a receiver's bond in the penal sum of fifty thousand dollars (\$50,000.00) as security, which was heretofore approved by this court, and was conditioned upon the faithful performance of his duties as such receiver, all in accordance with the terms and provisions of said order, and said Robert E. Sheldon is now the acting and duly qualified receiver in this cause; and it further appearing desirable and in the interests of all parties to this proceeding to direct certain procedures for said receiver to observe; and the court being fully advised in the premises,

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That said Robert E. Sheldon, as receiver as aforesaid, make a written monthly accounting of all his receipts and disbursements for each calendar month on or before the 10th day of the month succeeding the period covered by each report, the first report to be made on or before the 10th day of June, 1954.

2. That said receiver will deposit all receipts and collections made by him as such receiver in a checking account to be opened by him in his name as receiver in this case with the First National Bank of Fairbanks, Alaska.

3. That said receiver will make all expenditures for any purpose whatsoever in connection with said receivership only by check against said account hereinbefore mentioned signed by him, and countersigned by Ray Kohler, public accountant, who may be employed by said receiver to maintain his books of account.

4. That said receiver will secure the approval of this court for any unusual expenditures, except the usual, customary and routine payments required in connection with the operation and maintenance of the property and assets of Fairview Development, Inc., and the operation and conduct of Fairview Manor Apartments.

5. That said receiver may reimburse himself or pay the premium for his receiver's bond out of the income of the receivership estate.

Entered and Done this 10th day of May, 1954.

/s/ HARRY E. PRATT,

United States District Judge.

[Endorsed]: Filed and entered May 10, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Cash Cole, individually and as an officer and director of Bayview Realty, Inc., an Alaskan corporation, and Fairview Development, Inc., an Alaskan corporation; Bayview Realty, Inc., an Alaskan corporation, and Fairview Development, Inc., hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled cause, and from the Order overruling defendant's Motion to set aside and vacate said final judgment and the stipulation upon which said judgment was based, entered in this action on the 7th day of May, 1954.

BAILEY E. BELL,

WILLIAM SAUNDERS,

WARREN A. TAYLOR,

Attorneys for Appellant.

By /s/ WARREN A. TAYLOR,

Of Appellant's Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

ORDER

This Matter Coming on to Be Heard upon motion of Fairview Development, Inc., an Alaska corpora-

tion, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., plaintiffs, by their attorneys, Collins and Clasby, to set a bond for costs, or supersedeas bond, or both, pursuant to Rule 73(c) and 73(d) of the Federal Rules of Civil Procedure, or to strike or dismiss the notice of appeal heretofore filed on or about May 10, 1954, by the defendants, Cash Cole, individually and as an officer and director of Bayview Realty, Inc., and Bayview Realty, Inc., an Alaska corporation; and upon the further motion of said plaintiffs by their said attorneys to strike from said notice of appeal the name of Fairview Development, Inc., one of the plaintiffs in the above-entitled cause because said plaintiff has at all times been represented in this cause by said Collins and Clasby and Josef Diamond and Earle Zinn of Lycette, Diamond & Sylvester and not by Bailey E. Bell and William Sanders and Warren A. Taylor; and the court having examined the pleadings and records in this cause, and having heard arguments of counsel and being otherwise fully advised in the premises,

It Is Now, Therefore, Ordered, Adjudged and Decreed as follows:

1. That the motions of said plaintiffs be and they are hereby granted as hereinafter more fully provided.
2. That an appeal cost bond be and it is hereby

set in the sum of \$1,500.00, to be executed by said defendants, Cash Cole and Bayview Realty, Inc., appearing in said notice of appeal, and by a corporate surety, such surety to be a bonding company appearing on the approved list of bonding companies maintained by The Treasury Department of the United States; and that said bond be filed at or before the filing of the designation of the record on appeal by said defendants.

3. That said defendants, Cash Cole and Bayview Realty, Inc., may file a supersedeas bond in the sum of \$250,000.00 in lieu of said appeal cost bond, such supersedeas bond to be executed by said defendants, Cash Cole and Bayview Realty, Inc., appearing in said notice of appeal, and by a corporate surety, such surety to be a bonding company appearing on the approved list of bonding companies maintained by The Treasury Department of the United States.

4. That the name of Fairview Development, Inc., an Alaska corporation, one of the plaintiffs herein, be and it is hereby stricken from said notice of appeal.

Entered and Done this 4th day of June, 1954.

/s/ HARRY E. PRATT,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered June 4, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings in this cause listed below comprise all proceedings requested by the Amended Designation of Contents of Record on Appeal of defendant Cash Cole, the appellant, and the Amended Designation of Additional Record for Printing of the Plaintiffs and Appellees, viz.:

1. Complaint.
2. Answer.
3. Stipulation.
4. Final Decree and Order.
5. Motion to Set Aside and Vacate the Stipulation and Judgment based thereon.
6. Affidavits of Cash Cole, Tom Cole, and Joseph M. Ribar in Support of Motion to Set Aside Stipulation and Judgment based thereon.
7. Affidavits of Tom Cole, Ruth Cole, and Cash Cole in Support of Motion to Set Aside Judgment and in Opposition of Motion for Appointment of Receiver.
8. Affidavits of Cliff Mortensen, Frank V. Henderson, Supplemental Affidavit of Mortensen and Henderson, Everett Nowell, Joe Diamond and Earle Zinn, W. A. Rushlight, and Joseph M. Ribar, M.D., in Opposition to the Motion to Set Aside and Vacate the Stipulation and Judgment based thereon.
9. Amended Answer.

10. Cross-Complaint.
11. Motion for Appointment of Receiver.
12. Amended Motion for Appointment of Receiver.
13. Supplemental Affidavit of Everett Nowell in Support of Motion for Appointment of Receiver.
14. Supplemental Affidavit of Cliff Mortensen in Support of Amended Motion for Appointment of Receiver.
15. Affidavits of Cash Cole and Allene Hendricks in Opposition to Plaintiffs' Motions for Appointment of Receiver and Temporary Injunction and in Support of Motion to Vacate Stipulation and Judgment.
16. Findings of Fact and Conclusions of Law.
17. Order Denying Defendants' Motion to Vacate Final Judgment; Appointing Receiver; and Directing Delivery of Certificate of Stock.
18. Motion to strike name of Fairview Development, Inc., as Party Plaintiff.
19. Minute Order denying above Motion.
20. Notice of Hearing of Plaintiffs in re Bonds.
21. Order in re Bonds.
22. Order directing Procedure of Receiver.
23. Bond for Costs on Appeal.
24. Amended Designation of Contents of Record on Appeal of Defendant and Appellant.

The following is the list of Proceedings requested by the Plaintiffs and Appellees in their Amended Designation of Additional Record for Printing, viz.:

1. Appearance of counsel for defendants.
2. Motion for Appointment of Receiver.
3. Affidavits of Cliff Mortensen and Everett Nowell in Support of Plaintiffs' Motion for Appointment of Receiver and Temporary Injunction.
4. Affidavit of Cash Cole regarding Corporate Minutes.
5. Affidavit of Cole regarding Agreement of December 1, 1951.
6. Affidavit of Cole regarding his letter of March 8, 1953.
7. Affidavit of Cliff Mortensen in Opposition to Affidavits of Cash Cole and Everett Nowell, dated August 3, 1953.
8. Affidavit of Cliff Mortensen regarding letter of Nowell, dated May 24, 1951.
9. Affidavits of Frank V. Henderson, J. F. Campbell, and J. E. Swanson, Jr., filed August 14, 1953.
10. Order Appointing Receiver.
11. Notice of Withdrawal of Attorneys.
12. Notice of Default and Demand.
13. Motion to Show Cause.
14. Certified copy of Complaint in cause No. 3532, entitled Fairview Development, Inc., a Corporation, vs. Nelse Mortensen Alaska, Inc., a Corporation, and filed in the District Court for the Western District of Washington.
15. Motion to strike Notice of Appeal.
16. Transcript of Proceedings of June 4, 1954.
17. Receiver's Petition No. 1.
18. Order on Receiver's Petition No. 1.

19. Receiver's Monthly Report and Account for May, 1954.

20. Amended Designation of Additional Record for Printing.

21. Transcript of Proceedings on May 5, 6, and 8, 1953, at Fairbanks, Alaska. (Separately Bound.)

Witness my hand and the seal of the above-entitled Court this 10th day of July, 1954.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14424. United States Court of Appeals for the Ninth Circuit. Cash Cole, et al., Appellants, vs. Fairview Development, Inc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Alaska, Fourth Division.

Filed July 12, 1954.

 /s/ PAUL P. O'BRIEN,
Ninth Circuit.
Clerk of the United States Court of Appeals for the

In the United States Court of Appeals
for the Ninth Circuit

No. 14424

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. That the Court erred in overruling defendants' Motion to Set Aside and Vacate the Stipulation and Judgment Based Thereon.

2. That the Court erred in appointing a receiver for Fairview Manor, the property of Fairview Development, Inc.

3. That the Court erred in setting the amount of the Receiver's Bond in the sum of \$50,000.00 and setting the amount of the Supersedeas Bond on appeal in the sum of \$250,000.00, the same to be a bond written by a surety company.

4. That the Court erred in sustaining plaintiffs' Motion increasing bond for costs on appeal from \$250.00 to \$1,500.00, and requiring said surety to be a corporate surety.

5. That the Court erred in denying appellants' Motion for leave to file amended Answer and Cross-Complaint.

6. That the allegations of the Complaint do not constitute a cause of action against the defendants.

7. (a) That the Court erred in its Findings of Facts No. 1. That there was dissension and discord as to who comprised the directorate; disposition of corporate assets; impairment of corporate property and income and profits by the defendants; exercise of corporate powers without authority of the Board of Directors.

(b) That the Court erred in its Finding of Facts No. 3 that Cash Cole purportedly suffered a heart attack, when, in fact, the testimony was uncontradicted that he did, in fact, suffer such attack.

(c) That the Court erred in its Finding of Facts No. 4 in referring to Cash Cole's serious heart condition as "purported illness."

(d) That the Court erred in its Finding of Facts No. 6 that Cash Cole had failed to deposit Fairview Development, Inc., stock in escrow, because said stock was being held in escrow by Roy Sumpter, and said Cash Cole was prevented from securing said stock to place the same in escrow with a bank at Fairbanks, Alaska, by said plaintiffs and their attorneys; and that the Court erred in failing to find that the claim of Pilip & Butt Painting Contractors and C. H. Keaton were not valid claims

against Fairview Development, Inc., but were, in fact, obligations of the other plaintiffs; that the sum of \$8,800.00, as shown by the evidence, was money held on deposit with the National Bank of Commerce in Seattle for the purpose of completing the landscaping of Fairview Manor; that the Rushlight claim was not a valid claim against Fairview Development, Inc., but was, in fact, a valid claim against the other plaintiffs.

(e) That the Court erred in its Finding of Facts No. 9 in that the evidence conclusively showed that said Cash Cole was so ill at the time of the execution of the Stipulation in question that he could not read and did not know the intent and import of the documents.

(f) That the Court erred in its Finding of Facts No. 9 that Tom Cole, Ruth Cole and Cash Cole participated in the negotiations mentioned in said finding, as the uncontradicted testimony showed that Mrs. Cole and Tom Cole had no knowledge of the state of the negotiations, and that Jaureguy did not participate in the said negotiations.

(g) That the Court erred in its Finding of Facts No. 9 in that Cash Cole was competent and understood the nature of the negotiations, whereas the only medical testimony states that Cash Cole was a very sick man and not able to attend to business affairs and that medicine given to Cole would dilate his eyes for at least three days so that he could not read, which were the days in which the negotiations

were carried on. That there are no statements in plaintiffs' affidavits that deny that Cash Cole was unable to read during the period of a week following the heart attack.

(h) That the Court erred in its Finding of Facts No. 13, in that the ultimate facts indicate that the plan or scheme was successful and the plaintiffs did succeed in securing the property mentioned without adequate consideration for the same. The evidence was sufficient to show that the facts set forth by the defendants were of such a nature as to mislead and overreach Cash Cole and successfully carry out the scheme of the plaintiffs.

(i) That the Court erred in its Finding of Facts No. 15, in that the claims of Rushlight & Co., Pilip & Butt Contractors were obligations of the other plaintiffs and not of Fairview Development, Inc., or the defendants. Plaintiffs were only paying an obligation by reason of subcontracts with the said concerns.

(j) That the Court erred in its Finding of Facts No. 16, in that the claims and liens affected only the plaintiffs, Mortensens and Henderson, and not Fairview Development, Inc., or the defendants.

(k) That the Court erred in its Finding of Facts No. 17, in that the pending causes mentioned in said Finding were not actions involving Fairview Development, Inc., and the defendants, except Cause No. 3532, Fairview Development, Inc., versus Nelse Mortensen-Alaska, Inc.

(l) That the Court erred in its Finding of Facts No. 19, in that said Finding is contrary to the evidence.

(m) That the Court erred in its Finding of Facts No. 20, in that said Finding is contrary to the evidence.

(n) That the Court erred in its Finding of Facts No. 21, as said Finding of Fact is contrary to the evidence, as the note payable to Rushlight, made at the same time and place as the Stipulation sought to be set aside, was without consideration, and that the fact is corroborative of the plan and scheme entered into by plaintiffs and Rushlight to defraud defendants.

(o) That the Court erred in its Finding of Facts No. 22, in that there was no evidence that Cause No. 3532, Fairview Development, Inc., versus Nelse Mortensen-Alaska Company was dismissed, and further that Nelse Mortensen-Alaska Co. is not a party to this suit, and any dismissal with prejudice in that cause would not prejudice the defendants in the present cause; and for the further reason that the plaintiffs instituted the present action, and the filing of a Cross-Complaint is permissible.

(p) That the Court erred in its Finding of Facts No. 23, in that the Finding is contrary to the evidence.

(q) That the Court erred in its Conclusions of Law, as they are not based upon its Findings of Facts predicated upon the evidence.

8. That the Court erred in overruling defendants' Motion to strike Fairview Development, Inc., from the title of plaintiffs' Complaint.

BELL & SANDERS, and
WARREN A. TAYLOR,

By /s/ WARREN A. TAYLOR,
Of Appellants' Attorneys.

Service of copy acknowledged.

[Endorsed]: Filed June 29, 1954.

No. 14424

**United States
Court of Appeals**
for the Ninth Circuit

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

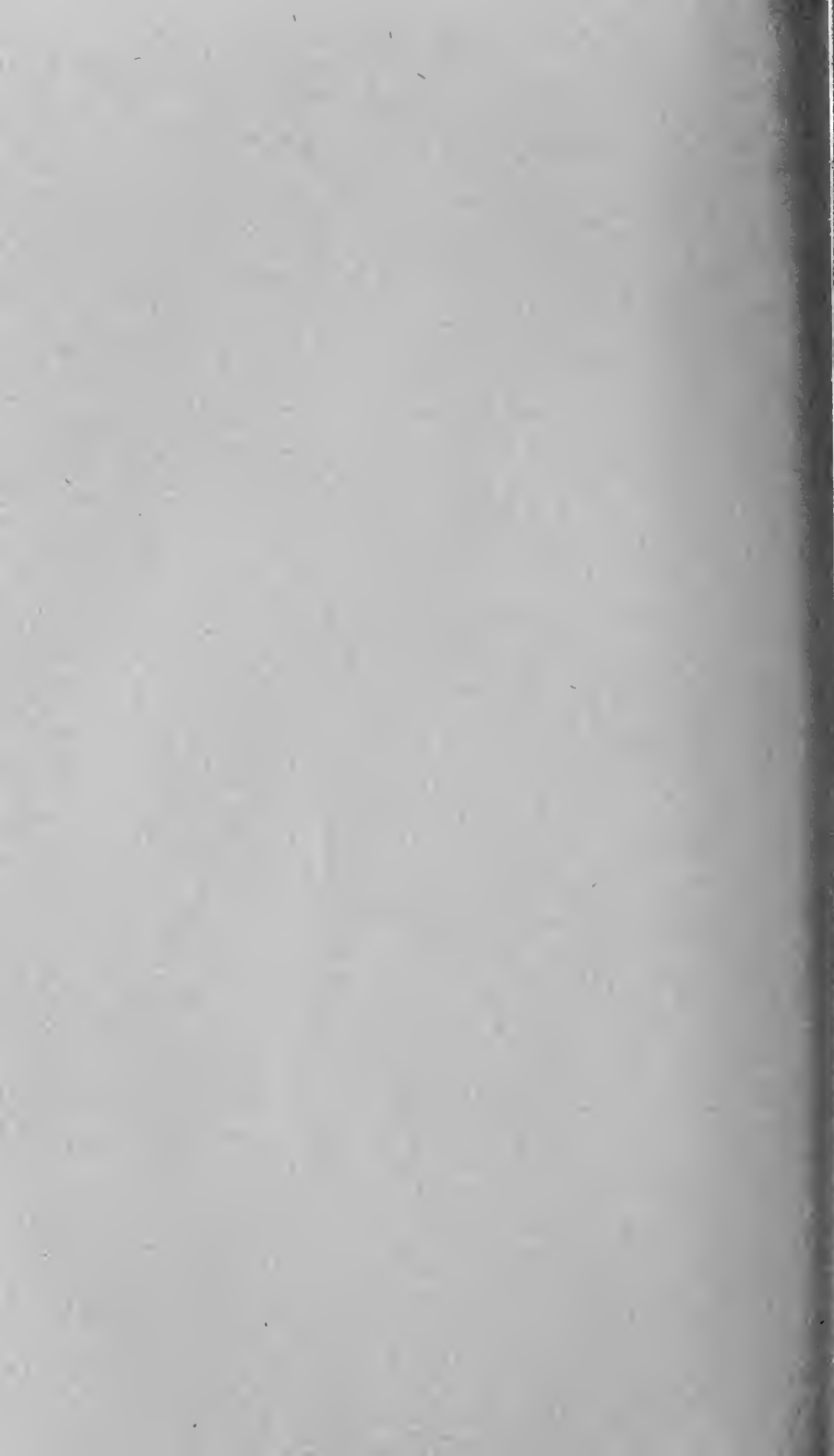
**Supplemental
Transcript of Record**

**Appeal from the United States District Court
for the District of Alaska,
Fourth Division**

FILED

MAR 21 1955

PAUL P. O'BRIEN, CLERK



No. 14424

**United States
Court of Appeals**
for the Ninth Circuit

CASH COLE, et al.,

Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court
for the District of Alaska,
Fourth Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of
Alaska, Fourth Division

No. 7298

FAIRVIEW DEVELOPMENT, INC., an Alaska Corporation; NELSE MORTENSEN, Cliff MORTENSEN and FRANK V. HENDERSON, Individually and as Directors and Stockholders of Fairview Development, Inc., and for and on Behalf of All Other Stockholders of Fairview Development, Inc.,

Plaintiffs,

vs.

CASH COLE, Individually and as an Officer and Director of Bayview Realty, Inc., an Alaska Corporation, and Fairview Development, Inc.; EVERETT NOWELL, Individually and as an Officer and Director of Bayview Realty, Inc., and Fairview Development, Inc.; BAYVIEW REALTY, INC., an Alaska Corporation; FIRST NATIONAL BANK OF FAIRBANKS, a Corporation, and BANK OF FAIRBANKS, a Corporation,

Defendants.

APPEARANCE

Come Now the following defendants: Cash Cole, individually and as an Officer and Director of Bayview Realty, Inc., an Alaska corporation, and Fairview Development, Inc.; Everett Nowell, individually and as an officer and director of Bayview

tiff corporation by said receiver until further order of this court.

In support of said motion said plaintiffs have filed herewith an affidavit of Cliff Mortensen.

Dated at Fairbanks, Alaska this 25th day of June, 1953.

COLLINS & CLASBY,

By /s/ WALTER SCZUDLO.

Affidavit of service by mail attached.

[Endorsed]: Filed June 25, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTIONS FOR APPOINTMENT OF RE-
CEIVER AND TEMPORARY INJUNC-
TION

State of Washington,
County of King—ss.

The undersigned, Cliff Mortensen, being first duly sworn upon oath deposes and says as follows:

1. That he is a citizen of the United States and the State of Washington; that he is over the age of twenty-one years and sui juris.

2. That he is one of the plaintiffs in the above-entitled cause, and that said cause was filed by Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned, and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and

for and on behalf of all other stockholders of Fairview Development, Inc., because of the deadlock in the conduct or management of the affairs of the plaintiff corporation, Fairview Development, Inc., due to failure of the board of directors to proceed; deadlock among the stockholders and members of the board of directors resulting in deadlock and paralysis of corporate functions; dissention and discord as to who in fact comprise the board of directors; mismanagement and improper disposition of funds and dissipation of assets, and impairment of said corporation property by one or more of the principal defendants in the above-entitled cause.

3. That the plaintiff, Fairview Development, Inc., is a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska.

4. That the plaintiff, Fairview Development, Inc., was organized for the purpose of obtaining a Federal Housing Administration insured loan to provide funds for the construction of a large apartment housing project in Fairbanks, Alaska. Said plaintiff corporation obtained an insured mortgage loan for the construction of such apartment housing project now known as Fairview Manor, situated in Fairbanks, Alaska, upon lands leased by the plaintiff corporation from the City of Fairbanks for a term of 75 years, and did construct said housing project.

5. That the plaintiffs, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson are stockhold-

the plaintiff corporation, Fairview Development, Inc., the funds received by them from rentals and other income from said project; and have failed to account for such funds belonging to the plaintiff corporation to its board of directors, or to obtain the approval of said board of directors for withdrawal of said funds for their own benefit or for the payment of salaries and expenses to themselves.

f. Have failed to secure authority and approval of the board of directors of said plaintiff corporation, as to any salaries taken by them or the free rental of their apartments, or the approval of extraordinary disbursements or expenses or costs, or determination of corporate policies or exercise of corporate powers.

g. Have taken to themselves the operation, management and direction of the property of the plaintiff corporation, Fairview Development, Inc., or the determination of corporate policies, or the exercise of corporate powers.

h. Have failed, or neglected, or refused to call or hold any annual meeting of the stockholders as required by the bylaws of the corporation.

i. Have refused to permit any record or minutes of meetings of board of directors to be kept or proper action to be taken therein.

j. Have done other acts and taken other actions without authority of the board of directors of said plaintiff corporation which are detrimental to the interests of said corporation, its stockholders in general and the plaintiffs in particular.

8. That the acts and actions of said defendants hereinabove mentioned have operated to the detriment, loss and damage of the plaintiff corporation, Fairview Development, Inc., and the individual plaintiffs as stockholders of said corporation; that such acts and actions are contrary to the general laws of the Territory of Alaska, or the articles of incorporation, or the bylaws of said plaintiff corporation; and that such acts and actions are contrary to the provisions, terms and conditions of a certain agreement dated June 16, 1950, as more fully alleged in paragraphs XI and XII of the complaint filed herein.

9. That the defendants, First National Bank of Fairbanks, and Bank of Fairbanks, have on deposit funds of Fairview Development, Inc., which will be dissipated and expended without authority, or for the personal use and benefit of the defendants, Cash Cole and Everett Nowell, or either of them, without the authority of the board of directors, or the stockholders of Fairview Development, Inc., and said money will be used for other than corporate purposes, all to the damage of the plaintiff corporation, Fairview Development, Inc., and the stockholders of said plaintiff corporation, unless said defendant banks are restrained and enjoined from disbursing said funds upon the orders or direction of the defendants, Cash Cole, or Everett Nowell, or Bayview Realty, Inc., or any of them acting alone or in concert.

10. That although the plaintiff Fairview Development, Inc., is fully solvent, a deadlock exists on the board of directors of said corporation and among the stockholders of said corporation on matters vitally affecting the welfare and best interests of said corporation; that the officers and directors of said plaintiff corporation are unable to agree upon matters affecting the life or affairs of said corporation; that the common stock ownership is evenly divided between opposing factions and an impasse exists between such factions both on the board of directors thereof and among the stockholders thereof. No decision or action can be taken or had by the plaintiff Fairview Development, Inc., for the protection of its assets and property for the benefit of all stockholders by reason of said deadlock.

11. That the property and assets of the plaintiff corporation are presently being dissipated and lost by reason of said deadlock on said board of directors and among the stockholders; that irreparable injury and damage will be done to the plaintiff, Fairview Development, Inc., and the plaintiffs Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, and all stockholders of the plaintiff corporation unless this court intervenes for their protection.

12. Pursuant to the prayer contained in the complaint filed in the above-entitled cause, and under the general laws of the Territory of Alaska, the plaintiffs jointly and severally are entitled to the

appointment of a receiver for the property of said corporation, Fairview Development, Inc., to collect the rents, issues, income and profit thereof during the pendency of this action and until final decree of this court, and to protect and preserve said property and the interests of said corporation and the interests of all of the stockholders of said corporation; and to the entry of a temporary injunction restraining and enjoining said defendants, Cash Cole and Everett Nowell and Bayview Realty, Inc., as prayed for in the complaint filed herein.

Dated at Seattle, Washington, this 22nd day of June, 1953.

/s/ CLIFF MORTENSEN.

Subscribed and sworn to before me this 22nd day of June, 1953.

[Seal] /s/ JOSEPH DIAMOND,
Notary Public in and for the
State of Washington.

My commission expires: Jan. 25, 1954.

Affidavit of service by mail attached.

[Endorsed]: Filed June 25, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFFS' MOTION FOR APPOINTMENT OF RECEIVER AND TEMPORARY INJUNCTION

State of Washington,
County of King—ss.

The undersigned, Everett Nowell, being first duly sworn of oath, deposes and says:

1. That he is a citizen of the United States and of the Territory of Alaska; that he is over the age of twenty-one years and sui juris.

2. That he is one of the defendants in the above-entitled cause.

3. That he has read the Affidavit of Cash Cole, one of the defendants in the above-entitled cause, is familiar with the contents thereof and knows the same to be true.

4. That he hereby incorporates and adopts the affidavit of Cash Cole, above referred to as his own and by this reference makes it a part hereof as if the same were set out in full herein.

5. That the individual plaintiffs herein, namely: Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, as builders and contractors contrary to their agreements and responsibilities, allowed the following liens to be placed against the said housing project:

a. Lien claim of A. G. Rushlight & Co., a corporation, in the sum of Three hundred fifty-six thousand four hundred three & 85/100 (\$356,403.85)

Dollars plus interest and costs, filed December 19, 1951.

b. Lien claim of Clem Pilip, d/b/a Pilip Company, in the sum of Seventy-seven thousand six hundred eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed January 21, 1952.

c. Lien claim of C. H. Keaton, d/b/a Keaton Paint Company in the sum of Seventeen thousand three hundred thirty-nine & 44/100 (\$17,339.44) Dollars plus interest and costs, filed February 16, 1952.

d. Lien claim of Pilip & Butt Painting Contractors, Inc., in the sum of Seventy-seven thousand six hundred eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed March 3, 1952.

That the allowance of said liens being filed has placed the ownership of said project in jeopardy, has endangered the good relationship with the loaning institutions and has in general endangered the success of the entire corporation.

Dated at Seattle, Washington, this 3rd day of August, 1953.

/s/ EVERETT NOWELL.

Subscribed and sworn to before me this 3rd day of August, 1953.

[Seal] /s/ JOHN E. HEDRICK,
Notary Public in and for the State of Washington,
Residing at Seattle.

Affidavit of service by mail attached.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, deposes and says that the attached document is a true copy of the minutes of a special meeting of the Board of Directors of Fairview Development, Inc., held on the 3rd day of August, 1951.

/s/ CASH COLE.

Subscribed and sworn to before me this 7th day of August, 1953.

[Seal] /s/ ARNOLDINE R. SCOTT,
Notary Public in and for the
Territory of Alaska.

My commission expires March 31, 1956.

Minutes of Special Meeting of Board of Directors
of Fairview Development, Inc.

A special meeting of the Board of Directors of Fairview Development, Inc., a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, was duly and regularly held pursuant to notice at Fairbanks, Alaska, on the 3rd day of August, 1951, at the hour of 10:00 a.m. in the forenoon of the said day, at which meeting the following named, being all the directors of said corporation, were personally present, to wit: Everett Nowell, Cash Cole and Cliff Mortensen.

Everett Nowell presided and Cash Cole acted as Secretary of the meeting. Mr. Everett Nowell stated that the primary purpose of the special meeting of the Board of Directors of Fairview Development, Inc., was making and settling the arrangement for the management of the property of Fairview Development, Inc. He explained that the apartment units owned by Fairview Development, Inc., were being completed and several of them had been completed, that tenants were being contacted for the purpose of leasing and moving in said apartment units, that thus far several apartment units had been leased and occupied by tenants, that it has been since the beginning of the organizing of Fairview Development, Inc., the intent of all the stockholders that the management of the property should be given to Bayview Realty, Inc., an Alaska corporation, of which Cash Cole and Everett Nowell are the owners and that it has been the intent of all interested parties that Cash Cole and Everett Nowell could dissolve Bayview Realty, Inc., as a corporation and operate personally, but that either Bayview Realty, Inc., or Cash Cole and Everett Nowell as individuals, should have the management of the properties of Fairview Development, Inc., that it has been the intent of all interested parties that the managing agent should completely manage the property and receive therefor a 5% fee of the total income with a guarantee of not less than Two Thousand Dollars per month; that the purpose of this meeting was to effectuate the past contracts

and adopt a proper resolution to place said understanding and contracts in effect. That thereupon Mr. Cash Cole as Secretary-Treasurer of the corporation, read the following resolution:

Resolution:

“Whereas, this corporation has heretofore had certain contractual relations and understandings with Bayview Realty, Inc., a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and

“Whereas, Bayview Realty, Inc., an Alaska Corporation, is owned solely by Cash Cole and Everett Nowell, and

“Whereas, Bayview Realty, Inc., and Cash Cole and Everett Nowell are in the business of managing real property, and

“Whereas, it is to the best interests of this corporation, Fairview Development, Inc., to have its properties properly managed, and

“Whereas, it is the desire of the directors of this corporation to utilize the abilities, capacities, energies and skills of Bayview Realty, Inc., and Cash Cole and Everett Nowell; now, therefore,

“Be It Resolved that this Company execute with Bayview Realty, Inc., a contract containing, among other things, the following provisions:

“1. That Bayview Realty, Inc., shall use its best efforts and energies in assuming and carrying on the complete property management of the property of Fairview Development, Inc., that among the duties assumed by Bayview Realty, Inc., will be the following, but not limited to the following: Collect

all monies, incur all bills, pay all bills by check, without counter signature, carry on generally the management of the properties of Fairview Development, Inc., in the manner now being conducted by it in said management, deposit all monies collected under the name of Fairview Development, Inc., follow and keep current the bookkeeping system installed and devised by Mr. Lofquist, an account of Pritchard & Lofquist, Exchange Building, Seattle, Washington.

"2. That Fairview Development, Inc., pay to Bayview Realty, Inc., a fee of 5% of the total income of Fairview Development, Inc., with a minimum guarantee of not less than \$2,000.00 per month and that all expenses incurred by Bayview Realty, Inc., including such fee, be paid from the general receipts of Fairview Development, Inc.

"3. That the sole owners of Bayview Realty, Inc., that is, Cash Cole and Everett Nowell, may dissolve Bayview Realty, Inc., and operate Bayview Realty, Inc., as individuals, that in such case the provisions herein provided for shall run to the two named individuals."

Following the reading of the above resolution, Mr. Cliff Mortensen moved that the said resolution be adopted, whereupon a vote was taken of all directors present and it was unanimously decided to adopt the said resolution.

Then Mr. Cash Cole stated that it was the understanding of all the directors of Fairview Development, Inc., that all profits of Fairview Development, Inc., should be made available to the stock-

holders of Fairview Development, Inc., as dividends at the end of each year. That the stockholders could draw their dividends or leave them with the corporation as they saw fit.

Thereupon Mr. Cash Cole offered the following resolution:

Resolution:

“Whereas, it is the intent of all stockholders to realize a profit from their investment in this corporation, and

“Whereas, it is the desire of the stockholders to realize cash income yearly from said investment, now, therefore,

“Be It Resolved that all profits of Fairview Development, Inc., shall be used as dividends of the capital stock of such corporation and be made available to the stockholders at the end of each fiscal year.”

The said resolution was, upon a vote taken, unanimously adopted.

There being nothing further to come before the meeting, the motion for adjournment was made and adopted.

/s/ EVERETT NOWELL,
President.

Attest:

/s/ CASH COLE,
Secretary.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, deposes and says that the attached document is a true copy of an agreement entered into December 1, 1951, between Fairview Development, Inc., an Alaska corporation, and Bayview Realty, Inc., an Alaska corporation.

/s/ CASH COLE.

Subscribed and sworn to before me this 7th day of August, 1953.

[Seal] /s/ ARNOLDINE R. SCOTT,
Notary Public in and for the
Territory of Alaska.

My commission expires March 31, 1956.

Agreement

This Agreement, made and entered into this 1st day of December, 1951, by and between Fairview Development, Inc., a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, hereinafter termed and designated "The Owner," and Bayview Realty, Inc., a corporation organized under the laws of the Territory of Alaska, hereinafter termed and designated "The Agent."

Witnesseth:

Whereas, the Owner is the Owner of that certain property known as Fairview Manor, situate in the Town of Fairbanks, Alaska, and has agreed to engage the services of the Agent as sole agent in the manner and upon the terms hereinafter set forth, now, therefore,

In Consideration of the Premises and of the Sum of One Dollar and of Other Good and Valuable Considerations, the Receipt of Which Is Hereby Acknowledged, the Parties Hereto Have Agreed as Follows, to wit:

First: The Owner does hereby employ and retain the Agent as sole agent for and in connection with the management and operation of that certain project, in said Town of Fairbanks, Alaska, commonly known as the "Fairview Manor Project" for the term commencing the first day of December, 1951, and ending the first day of December, 1984.

Second: The Agent shall and will collect any and all rents or other monies due or to become due in connection with said premises or any part thereof; it shall lease all or any part thereof at the best price obtainable under existing conditions and it shall maintain and cause to be maintained, said premises in good order and repair and make such expenditures or cause the same to be made as may be or become necessary from monies collected, so as to assure proper maintenance and operation thereof.

Third: It is understood and agreed that the Agent shall employ all necessary help, make all necessary

purchases as may be necessary in the premises, contract for and cause to be made all repairs and pay all expenses incurred in connection with the operation and maintenance of said premises and buildings.

Such expenses shall be deducted monthly and vouchers therefor shall accompany each monthly statement.

Fourth: The Agent shall render monthly to the Owner a statement which shall show all income and disbursements.

Fifth: It is expressly understood and agreed that all applications for space in said project, or any part thereof, are to be referred to the Agent, it being understood that all leases and other arrangements for the occupancy of any space in said project or buildings, or portions thereof, shall be referred to and closed by said Agent and by no one else.

Sixth: The Agent is hereby authorized and shall have power and authority to take any action at law or in equity, which it shall deem necessary or appropriate for the purpose of enforcing collection of moneys due from tenants or to repossess any portion of the premises, in the event conditions should make it necessary to repossess any portion of the premises.

Seventh: The Agent shall render to the Owner bills for all assessments, taxes and water which may be levied by constituted authority against said premises.

Eighth: The Owner agrees to pay to the Agent five per cent of the amount of all monies collected as rentals. Said five per cent to be deducted each month as part of the expenses incurred in the management and operation of said premises, provided that five per cent of such rentals shall amount to \$2,000.00 or more per month, and if such be not the case in any one month, then said Agent shall nevertheless be paid the sum of \$2,000.00 and the difference between five per cent of said rental and \$2,000.00 shall be made up out of the total rents collected during any one month.

Ninth: It is hereby understood by the parties hereto that Bayview Realty, Inc., an Alaska corporation, is wholly owned by Cash Cole and Everett Nowell. That upon their decision and discretion they may dissolve Bayview Realty, Inc., as a corporation and take over the assets and liabilities of such corporation personally. That all rights and conditions of this contract shall in such event of dissolution be binding on and in favor of Cash Cole and Everett Nowell as individuals.

Tenth: And finally it is agreed between the Owner and the said Agent that all moneys received from rentals of said premises shall be applied as follows:

(a) To the payment of all expenses incurred in connection with the management and operation of said project and premises, including, but not limited to, wages, repairs, replacements, taxes, impositions and compensations of said Agent as set forth in paragraph Eight.

(b) Payment of monthly sum of
to the National Bank of Commerce of Seattle,
Washington, in accordance with provisions of a
certain indenture of mortgage, dated the day
of June, 1950, reference to which is hereby made,
and any balance remaining shall be deposited to the
account of Fairview Development, Inc., to be used
as profits according to the agreement of the owners
of the stock of such Fairview Development, Inc.

In Witness Whereof, the said parties have caused
these presents to be executed by their respective
officers, pursuant to a resolution duly adopted by
their respective Board of Directors, this 1st day of
December, 1951.

[Seal] FAIRVIEW DEVELOPMENT,
INC.,

By /s/ EVERETT NOWELL,
President;

/s/ CASH COLE,
Vice-President;

.....,
Secretary.

[Seal] BAYVIEW REALTY, INC.,

By /s/ EVERETT NOWELL,
President;

/s/ CASH COLE,
Secretary.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska—ss.

Cash Cole, being first duly sworn, deposes and says that the attached is a true copy of a letter sent to Institutional Securities, c/o Seattle Trust and Savings Bank, and Federal Housing Administration, Juneau, Alaska, dated March 18, 1953.

Said Institutional Securities has a F.H.A. guaranteed mortgage in the sum of \$3,080,000 on the property known as Fairview Manor, owned by Fairview Development, Inc., located at Fairbanks, Alaska.

The attached letter is the document referred to in a letter from J. F. Campbell, Vice President and Manager of the Mortgage Loan Department of the Seattle Trust and Savings Bank, Seattle, Washington, on Page 7 in an affidavit of the undersigned in opposition to Plaintiffs' motions for appointment of receiver and temporary injunction.

/s/ CASH COLE.

Subscribed and sworn to before me this 7th day of August, 1953.

[Seal] /s/ ARNOLDINE R. SCOTT,
Notary Public in and for the
Territory of Alaska.

My Commission expires March 31, 1956.

March 18, 1953.

Institutional Securities,
c/o Seattle Trust & Savings Bank,
Seattle, Washington, and
Federal Housing Administration,
Juneau, Alaska.

Re: Fairview Manor.

Gentlemen:

We have now completed our first year of operation and as a result of the severe climatic conditions and limited public utilities in the area, numerous changes and improvements have had to be made and must be made to the project in order to safeguard the property and protect the occupants. Improvements that have already been made and paid for from rental income are as follows:

1. To eliminate the continuous usage of the four 15 H.P. water pumps, four 1 and 1½ water pumps were installed\$ 3,146.26
2. Sixty fire extinguishers 1,461.24
3. Thirty-two fire hose racks..... 1,565.49
4. Thirty-two fire hoses..... 571.40
5. Fire ropes 108.67
6. In order to reduce noise in the hot water system, silent-checked valves were installed 300.00

7. Additional safety controls were added to all boilers at the request of the Fire Underwriters.....	243.64
8. To eliminate misuse of laundry equipment, 32 coin meters were installed on equipment	1,032.05
9. Additional laundry trays were installed in all laundry rooms.....	1,048.10
10. Storm windows and ventilating and heating water pipes in garage areas.	3,500.00
11. Roof fences in all buildings to prevent ice from forming on roofs.....	5,000.00
12. Real estate taxes levied during construction	31,612.00
13. Interest on mortgage:	
Due January 1, 1952	\$9,075.26
30 days delinquent interest	30.25
Due February 1, 1952....	9,194.76
	<hr/>
14. One Chevrolet truck, one Ford truck, one International dump truck and one tractor purchased to provide snow and ash removal.....	8,207.34
15. Project warehouse	9,708.89
16. Power house and plant (Two 50 K.W. Diesel generators).....	22,340.44
17. Cover and insulate exposed heating pipes in front hallways to prevent freezing	2,000.00
18. Connect fire hoses to water system..	3,600.00
	<hr/>
Total	\$113,745.79

In addition to the above improvements and expenditures we must immediately proceed with the following in order to preserve the property and maintain an efficient operation:

1. Install additional insulation in all attic areas to prevent heat loss and roof icing	\$ 7,500.00
2. Drill and install a second well for the safety of the project.....	15,000.00
3. Correct surface drainage around all entrance walks to prevent heaving and cracking and repair walks.....	9,500.00
4. Additional pipe insulation to prevent sweating	6,500.00
5. Replace aluminum roofing where damaged by ice removal.....	25,875.00
<hr/>	
Total	\$64,375.00

The project has operated at a high rate of occupancy. However, we have not been able to accumulate reserves adequate to meet the cost of these much needed improvements. We are requesting that you permit the withdrawal of our reserve for replacement fund and that you waive the monthly contribution to this account for one year. We feel that with this assistance and with what we are able to accumulate out of rental income, we shall have sufficient funds to pay for all this necessary work.

Your early reply will be greatly appreciated as

this type of work must be done before the large construction jobs commence in the area.

Very truly yours,

FAIRVIEW DEVELOPMENT,
INC.,

By
President;

By
Secretary.

CC:as

cc: Federal Housing Administration.

Receipt of copy acknowledged.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF CLIFF MORTENSEN IN
OPPOSITION TO AFFIDAVITS OF CASH
COLE AND EVERETT NOWELL, DATED
AUGUST 3, 1953

State of Washington,
County of King—ss.

Cliff Mortensen, being first duly sworn on oath, deposes and says: That he is a citizen of the United States and of the State of Washington, over the age of twenty-one years, competent to be a witness in the above-entitled action and one of the plaintiffs above named. That he is further an officer and

director of Fairview Development, Inc., That he makes this affidavit in opposition to the affidavits of Cash Cole and Everett Nowell, each dated August 3, 1953, purporting to have been subscribed and sworn to by the said Everett Nowell and Cash Cole before John E. Hedrick, Notary Public in and for the State of Washington, residing at Seattle. That he has read the said affidavits of the said Cash Cole and the said Everett Nowell.

1. That in the first instance Fairview Development, Inc., was organized by Everett Nowell and Cash Cole for the purpose of obtaining a lease upon a tract of land situated in Fairbanks Recording Precinct and erecting an apartment project thereon. That Nowell and Cole are not and were not builders or contractors and had neither requisite skill, knowledge or construction ability, nor the capital and financial standing to enable them either by themselves or by said corporation to obtain such lease and construct the apartment project. That Nowell and Cole accordingly came to affiant and Nelse Mortensen and Frank V. Henderson and proposed that the latter three become financially interested in Fairview Development, Inc., and that said corporation obtained a lease from the City of Fairbanks, an FHA insured mortgage loan in the amount of \$3,080,000, and constructed a 272-unit apartment project on these leased lands. That affiant and Nelse Mortensen and Frank V. Henderson were at first unwilling to become interested in said corporation, Fairview Development, Inc., on any basis

other than having the controlling interest in said corporation and control on the Board of Directors thereof. That when the parties were first negotiating in said project, it was upon the basis of Cliff Mortensen, Nelse Mortensen and Frank V. Henderson owning $\frac{2}{3}$ of the stock of Fairview Development, Inc., and Everett Nowell and Cash Cole owning $\frac{1}{3}$ thereof and the Mortensens having control on the Board of Directors of said corporation. That the negotiations between the parties were finally concluded upon the basis of the common stock of Fairview Development, Inc., being owned 50% by Bayview Realty, Inc., and 50% by affiant, Nelse Mortensen and Frank V. Henderson. It was further agreed that there would be three members on the Board of Directors of said corporation and that the directors were to be Cash Cole, Everett Nowell and Cliff Mortensen. It was further agreed between the parties as evidenced by a certain agreement, dated June 16, 1950, that Nowell and Cole, acting for themselves, and Bayview Realty, Inc., would together have one vote on the Board of Directors and that Cliff Mortensen acting for himself and Nelse Mortensen and Frank V. Henderson would have one vote on the Board of Directors, and that in the event of the inability of the parties to agree on matters affecting the welfare of the corporation and action to be taken by the Board, the matter would be referred to Ken Kadow of Juneau, Alaska, for his decision or in the event he was not available, then to Roy Sumpter for his decision and that the decision of the said Kadow

of Juneau, Alaska, or Sumpter of Seattle, Washington, on said matters in which Nowell and Cole, on the one hand, and the Mortensens and Henderson, on the other hand, were in disagreement would be binding upon all parties to said voting agreement.

That almost from the inception of the project, there has been disagreement and conflict between Cole and Nowell acting for themselves and/or Bayview Realty, Inc., on the one hand and Cliff Mortensen, Frank V. Henderson and Nelse Mortensen on the other hand on matters pertaining to corporate affairs. That Cole and Nowell conceive of Fairview Development, Inc., as their own project to be operated for their sole benefit, financially and otherwise, and refuse to recognize the rights of Nelse Mortensen, Frank V. Henderson and Nelse Mortensen on and to the corporate assets and corporate affairs. That Cole and Nowell have run said project for their individual benefits and as they themselves see fit without consulting the Mortensen interests and in numerous instances without advising the Mortensen interests of the action they have taken. That they have consistently held what purport to be meetings relating to the corporate affairs, either Directors' meetings or stockholders' meetings, without notice to Cliff Mortensen, Nelse Mortensen and Frank V. Henderson or either of them and have failed to keep accurate records and accounts of the proceedings of said meetings.

2. Referring to paragraph 10 of the affidavit of Cash Cole, the statement therein contained that

there was ever adopted at a duly and regularly called meeting of the Board of Directors of this corporation of which affiant had notice or at which he was present a resolution to the effect that Bayview Realty, Inc., would assume the management of Fairview Development, Inc., and received 5% of the total income of Fairview Development, Inc., with a minimum guarantee of not less than \$2,000 per month plus all expenses incurred by Bayview Realty, Inc., is utterly false. That no such action was ever taken by any regularly constituted meeting of the Board of Directors of said corporation nor was any such action ever taken at any meeting at which affiant was present or of which he had notice. Affiant further denies that the Board of Directors of said corporation, Fairview Development, Inc., ever authorized an agreement upon such basis or ever authorized any written agreement between Bayview Realty, Inc., and Fairview Development, Inc., purporting to embody the terms referred to as to said agreement of December 1, 1951. That at no time has Cliff Mortensen and Nelse Mortensen or Frank V. Henderson, or either of them, either in their capacity as stockholders or in their representation on the Board of Directors ever agreed to the payment of any such management sum to Bayview Realty, Inc., and/or Cash Cole or Everett Nowell.

3. Referring to paragraph 11 of the said affidavit of Cash Cole, affiant denies that the said Cash Cole and Everett Nowell, or either of them, have used their best efforts and energy in managing the

housing development known as Fairview Development, Inc.; that, on the contrary, they have arbitrarily preempted unto themselves the assets and income from said project, spent same at will without accounting to affiant and Nelse Mortensen and Frank V. Henderson therefor, and have wasted and mismanaged said project to its detriment and to the detriment of the stockholders of said corporation.

4. That there has never been any official action of the Board of Directors of said corporation authorizing the discharge of Herbert Lofquist, a certified public accountant, at one time employed to keep the books and records of said corporation. That affiant has received no accountings of the financial affairs of the corporation since Lofquist was purportedly discharged by Cole and Nowell who assumed unto themselves the authority to discharge him without the authorization of the Board of Directors of the corporation.

5. That the Board of Directors of said corporation has never, at any meeting attended by affiant or at any meeting of which he had notice, authorized the payment of any salaries to Everett Nowell as President of Fairview Development, Inc., or to Cash Cole as Secretary-Treasurer of said corporation.

6. That from the time of the organization of the Fairview Manor project, Everett Nowell has been employed by Alaska Freight Lines in a managerial or semi-executive capacity and has devoted a large

portion of his time to the interests of Alaska Freight Lines. That the said Everett Nowell has maintained a residence in the City of Seattle, Washington, and spends a large portion of his time in the City of Seattle, particularly during the winter months, and on matters wholly unrelated to the affairs of Fairview Development, Inc.

That Cash Cole has on several occasions since the inception of the project spent several months at a time sojourning in California on matters unrelated to the affairs of the corporation.

That Cliff Mortensen has never received nor drawn any salary from Fairview Development, Inc., although his efforts in the furtherance of its affairs and welfare have consumed large amounts of his time and managerial abilities, particularly in connection with matters pertaining to the financing and matters pertaining to the construction of said project. That it was the credit and financial standing of affiant, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, which made this project an actuality in the first place and that without said credit and financial standing and assistance and construction ability, Cole and Nowell would themselves have been unable to erect said project.

7. Referring to paragraph 15 of the affidavit of Cash Cole, the statement that it is necessary that Cash Cole and Everett Nowell occupy apartments in said housing project is false; that said apartments were occupied simply as matters of personal convenience to Cole and Nowell and were occupied

by them free, over the protest of affiant, Nelse Mortensen and Frank V. Henderson, and that such occupancy has never been authorized by any duly constituted or held Directors' meeting of the corporation. That the statement that proper minutes of the meetings of the directors of said corporation have been kept by Cole and Nowell is not true; that such minutes as Cole and Nowell purporting to substantiate their position are simply self-serving minutes of meetings which either never did take place or were held by Cole and Nowell without notice to affiant and/or Nelse Mortensen and Frank V. Henderson.

8. Referring to paragraph 16 of the affidavit of Cash Cole, Fairview Development, Inc., had commenced occupying and renting the units in the project prior to August 1, 1951; that the construction required to be done by Nelse Mortensen, Cliff Mortensen and Frank V. Henderson under the terms of the construction contract had been done prior to the date referred to in said paragraph and that consequently the obligations to pay the mortgage interest due January 1, 1952, and February 1, 1952, and the taxes levied August 1, 1951, were the obligations of Fairview Development, Inc., and not the obligations of Nelse Mortensen, Cliff Mortensen and Frank V. Henderson and/or Nelse Mortensen Alaska, Inc., or any of them.

9. Referring to paragraph 17 of Cash Cole's affidavit, affiant admits that there has recently been filed in the United States District Court for Western District of Washington a suit purportedly

brought in the name of Fairview Development, Inc., against affiant Cliff Mortensen, Nelse Mortensen and Frank V. Henderson wherein the prayer is for damages in the sum of \$699,912.27; affiant states, however, that said action has not been authorized by the Board of Directors of said corporation; that said action is without basis in law or in fact and is simply another unauthorized act on the part of Cole and Nowell to injure the credit and reputation of affiant, Nelse Mortensen, and Frank V. Henderson.

10. That in answer to paragraph 19 of the affidavit of Cash Cole, affiant states that he has read the affidavit of J. E. Swanson, Jr., herein in answer to the affidavit of Cash Cole and Everett Nowell. That the matters stated in the affidavit of the said J. E. Swanson, Jr., and in the transcription prepared by him as to what took place at the meeting of October 29, 1952, are true and correct and represent a full, true and correct and accurate account of what occurred at said meeting October 29, 1952.

That when the project was completed and the units occupied, Cash Cole and Everett Nowell, on behalf of themselves and on behalf of Bayview Realty, Inc., agreed to provide a fidelity bond to indemnify the corporation in connection with the handling of the corporation's funds. That such a bond was issued, but that the said Cole and Nowell have consistently refused either on behalf of themselves or on behalf of Bayview Realty, Inc., to sign the application for said bond, with the result that the bonding company cancelled the same and that

they have failed to furnish good and proper bond to the corporation.

11. Referring to paragraph 5 of the affidavit of Everett Nowell, filed herein, the lien claims therein referred to are all involved presently in litigation. That affiant, Nelse Mortensen, and Frank V. Henderson have presently on deposit in escrow with the National Bank of Commerce of Seattle funds in the amount of \$478,000 to cover such of said lien claims as may be adjudicated to be valid claims. That Cash Cole has done nothing whatsoever to protect the interests of Fairview Development, Inc., in connection with said lien claims, but, on the contrary, has, if not actively, at least, passively, co-operated with A. G. Rushlight & Co. in an effort to help said A. G. Rushlight & Co. substantiate its claim simply for the purpose of injuring affiant, Nelse Mortensen, and Frank V. Henderson and that instead of taking an adversary position to the positions of said lien claimants, Cash Cole has on the contrary taken a friendly position toward the said lien claimants and has been working and is working contrary to the interests of Fairview Development, Inc., in connection therewith.

/s/ CLIFF MORTENSEN.

Subscribed and Sworn to before me this 10th day of August, 1953.

[Seal] /s/ HERMAN HOWE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

ANSWERING AFFIDAVIT OF CLIFF MORT-
ENSEN IN OPPOSITION TO AFFI-
DAVITS OF CASH COLE AND EVERETT
NOWELL

State of Washington,
County of King—ss.

Cliff Mortensen, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs above named and makes this affidavit in opposition to the affidavits of Cash Cole and Everett Nowell on file herein.

That attached hereto is a photostatic copy of a letter received by affiant, dated May 24, 1951, from Everett Nowell pertaining to Fairview Development, Inc., and the operation of the Fairview Manor project. That said letter is on the letterhead of Alaska Freight Lines and is signed "Ev" and was received by affiant in due course of business pertaining to the affairs of Fairview Development, Inc.

/s/ CLIFF MORTENSEN.

Subscribed and Sworn to before me this 11th day of August, 1953.

[Seal] /s/ J. E. SWANSON, JR.,
Notary Public in and for the State of Washington,
Residing at Seattle.

Inter-Office Communications
Alaska Freight Lines, Inc.

Date: May 24, 1951.

To:

Subject:

From:

Dear Cliff:

Am leaving here June 7th for Juneau and after spending a couple of days there will come on in to Seattle. I feel it is necessary that we call a meeting of Fairview Development and discuss the management of the project. As it is with Cash controlling Bayview, he will run the place to suit himself and has control of all the funds and can pay himself an exorbitant salary and expenses and the rest of us will be on the outside.

Hope Ken will be able to come on down with me. You have probably gone over these matters with Joe but we have to have a specific contract with Bayview and have all the money deposited in Fairview and controlled by the accountants. We should also bond Cash. I don't trust the Bastard after what he pulled on Ken.

Met with Call and Hoopes today. They are preparing a letter to us, with copies to FHA and Health Dept. that the city plans on installing water mains at Weeks Field and when they are in will be able to furnish water to our project. This letter will satisfy the health dept. to approve our present sys

tem, if you can call it that. We are pumping up more sand than water at present and Stan is plenty worried.

The City has gone on record that they have to furnish us sewage disposal when we are ready to occupy the first building, so about the only thing that will hold us up for July first is the painters, floor men or that our appliances do not arrive.

We have about 200 letters requesting apts. and we haven't assured anyone of anything. God knows what would happen if we advertised the rentals. People are still hounding us for a date so they can get their furniture, etc. I'm doing nothing about nothing.

By all means we should have Frank Henderson at our meeting as he will be the only one that will be able to half reason with an insane man.

Best to all,

/s/ EV.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTIONS FOR APPOINTMENT OF RE-
CEIVER AND TEMPORARY INJUNC-
TION

United States of America,
Territory of Alaska—ss.

The undersigned, Frank V. Henderson, being first duly sworn upon oath, deposes and says as follows:

1. That he is a citizen of the United States and the State of Washington; that he is over the age of twenty-one years and *sui juris*.

2. That he is one of the plaintiffs in the above-entitled cause, and that said cause was filed by Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned and Cliff Mortensen, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., because of the deadlock in the conduct or management of the affairs of the plaintiff corporation, Fairview Development, Inc., due to failure of the board of directors to proceed; deadlock among the stockholders and members of the board of directors resulting in deadlock and paralysis of corporate functions; dissention and discord as to who in fact compromise the board of directors; mismanagement and improper disposition of funds and dissipation of assets, and impairment of

said corporation property by one or more of the principal defendants in the above-entitled cause.

3. That the undersigned has read the affidavit executed by Cliff Mortensen and filed in the above-entitled cause on June 25, 1953, in support of plaintiffs' motions for appointment of receiver and temporary injunction, and is familiar with the facts therein stated; and that by reference to said affidavit the undersigned does hereby adopt all of the statements therein made as if fully set out herein and confirms the same.

4. That the undersigned is informed and believes and upon such information and belief states the facts to be that the defendants in the above-entitled cause, or one or more of them, has used or will use monies or other funds of the plaintiff, Fairview Development, Inc., for the purpose of various unauthorized additions or changes in the structure and appurtenances of the Fairview Manor without proper authorization from the stockholders or the board of directors of said corporation, and to the irreparable harm and loss of the stockholders; and that such funds and monies of said plaintiff corporation are used for payment of unauthorized and excessive salaries to the defendants, Cash Cole and Everett Nowell, for other persons best known to said defendants, without proper authority either from said stockholders or board of directors to the irreparable loss and damage of the stockholders.

5. That the undersigned is further informed and believes and upon such information and belief states

the facts to be that the affairs of said plaintiff corporation, Fairview Development, Inc., have not been properly conducted or managed due to the failure and refusal of the defendants herein individually and in their respective capacities, to hold stockholders' meetings and board of directors' meetings, to abide by the bylaws of said plaintiff corporation, its articles of incorporation and the General Laws of the Territory of Alaska concerning the control and conduct of corporate affairs, and have prevented and continued to prevent each of the plaintiffs, who are stockholders or Cliff Mortensen as director and officer of said plaintiff corporation, from exercising their legal rights, title and interest in said corporation and in the conduct and management of the affairs of said corporation, to their irreparable injury, loss and damage, as well as to the irreparable injury and damage of said plaintiff corporation.

6. Efforts to settle the differences existing between the individual plaintiff stockholders and the individual defendant stockholders of the Fairview Development, Inc., have been made for some time, but no accord or compromise has been reached, and the discord and lack of agreement between said stockholders has continued and continues to the date hereof and has resulted and continues to result both in a deadlock among the stockholders of said plaintiff corporation and its directors. Said deadlock can only be resolved by a final decree of this Court in the above-entitled action. In the meanwhile the interests of the plaintiff stockholders and the plaintiff corporation can only be protected by the

appointment of a disinterested person as a receiver, and such appointment is necessary at this time to prevent further dissipation of assets of the plaintiff corporation and to grant to the plaintiff stockholders equal protection with that of the defendant stockholders.

7. The undersigned has been informed by the Territorial Health Department, Juneau, Alaska, and believes, and upon such information and belief states the facts to be that the defendant, Cash Cole, has violated health regulations pertaining to the Fairview Manor involved in this cause in the following respects:

(a) Said Cash Cole has refused to chlorinate the water used in said Fairview Manor as required by said health regulations.

(b) The Health Department has previously refused to allow drilling of a well near or adjacent to the building constituting said Fairview Manor, and has required previous approval of well sites. Said defendant Cash Cole has begun drilling a fourth well during the past year adjoining one of the buildings, a distance of approximately 6 to 8 feet contrary to the requirements of the Territorial Health Department, and without submitting for approval the site selected for said fourth well, and without authority from the board of directors or the stockholders. The undersigned advised Mr. Cole at the time said drilling was commenced regarding the disapproval of any location near the building for such well and their requirements, but said defend-

ant stated: "The hell with the Health Department! What can they do about it?" The undersigned advised Mr. Cole that such well could be condemned, but the latter stated they could not do so after it was drilled. The undersigned was informed at the Territorial Health Department several days ago that no request for approval of the drilling of said well had been received by said department.

Such violation of the regulations of the Health Department not only jeopardizes the health of the tenants at said project, but also the community, and results in unauthorized and unnecessary expenditure of corporate funds of the plaintiff corporation.

8. The undersigned has also been informed and believes and, upon such information and belief, states the facts to be that a four-inch line is contemplated or has been connected to the Fairview Manor water supply from the Hebb and Nordick's project, known as Arctic Park, located across the Airport Road from the Fairview Manor. Such connection has not been authorized by the stockholders of the plaintiff corporation or its board of directors, and is to the disadvantage and detriment of said stockholders and said plaintiff corporation.

9. The discord and disagreement and conflicting claims of the stockholders of the plaintiff corporation are further evidenced by the litigation now pending and involving said stockholders. Said litigation is as follows:

(a) Certain disagreements existed as to the work done on the Fairview Manor project by two sub-

contractors of Nelse Mortensen-Alaska, Inc., the general contractor. These subcontractors were: A. G. Rushlight & Company, an Oregon corporation, and Pilip & Butt, Inc., a corporation. Said subcontractors filed mechanics liens on their disputed claims against the Fairview Manor project. To resolve these disputes separate suits were filed by said general contractor and its successors in title against said subcontractors as follows: (1) Nelse Mortensen-Alaska, Inc., a corporation, et al., vs. A. G. Rushlight & Company, a corporation, in the District Court of the United States for the Western District of Washington, Northern Division, Case No. 3105; and (2) Nelse Mortensen, Cliff Mortensen and Frank B. Henderson, as co-partners, doing business as Nelse Mortensen-Alaska Co., et al., vs. Pilip & Butt, Inc., a corporation, and Clem Pilip, doing business as Clem Pilip Co., et al., in the Superior Court of the State of Washington for King County, as Case No. 442980. Suit was filed to foreclose its lien in this Court in which the above-entitled proceedings are pending by A. G. Rushlight & Company as Case No. 7163 against the Fairview Development, Inc., plaintiff in this cause, and Nelse Mortensen-Alaska, Inc., and others. The undersigned has been informed and believes and, upon such information and belief, states the facts to be that said Cash Cole has aided and abetted in the filing and prosecution of said suit, and has failed to assist in the defense thereof on behalf of Fairview Development, Inc., all to the detriment of said Fairview Development, Inc., and its stockholders.

(b) Suit was filed on or about July 23, 1953, under instructions of said Cash Cole in the District of the United States for the Western District of Washington, Northern Division, as Case No. 3532, entitled: Fairview Development, Inc., a corporation, vs. Nelse Mortensen-Alaska, Inc., the individual plaintiffs in this suit and their respective wives, on various purported claims arising under the construction contract between said Nelse Mortensen-Alaska, Inc., and the plaintiff corporation. Said suit was filed without proper authority of the stockholders of said corporation or its board of directors, and for the purpose of harassing the individual plaintiffs in this suit, and apparently in an effort to compel said individual plaintiffs to cease prosecution of this suit. This new litigation is referred to in paragraph 17 of Mr. Cole's affidavit filed in this cause.

(c) The above-entitled suit in which this affidavit is filed, the new suit mentioned in the preceding subparagraph, and the conduct of Mr. Cole in the Rushlight case show a serious deadlock among the stockholders of the plaintiff corporation, and disagreement as to conduct and management of the business of the plaintiff corporation and the impossibility of either the plaintiff stockholders or the defendant stockholders from imposing their will upon each other because of the equal division of the common stock, and therefore the necessity for appointment of a receiver to preserve and administer the corporation's property for the equal benefit of

all of the stockholders of the plaintiff corporation until the trial is held in this case and this Court, by final decree, directs disposition of the plaintiff corporation's assets.

10. Contrary to the statements contained in Mr. Cole's affidavit, Par. 17, filed in this cause the individual plaintiffs have completed the construction of Fairview Manor project according to the terms and provisions of the construction contract and have complied with all of its requirements, except for a few minor items, which said individual plaintiffs have attempted to settle with Fairview Development, Inc., but have been unable to do so by reason of Mr. Cole's opposition and refusal to consider any negotiations but only his own exaggerated and groundless claims alleged in the case above mentioned bearing No. 3532 referred to in paragraph 9(b) herein. The items in dispute do not exceed the maximum sum of \$20,000.00, whereas claims in the sum of \$699,912.27 have been made in the said suit. Many of these excessive and unreasonable claims are based on defects resulting from defective plans and specifications prepared by an architect selected by Mr. Cole in accordance with the agreement between the plaintiff corporation and the general contractor, and from changes occurring during the progress of the construction, which changes were required and authorized by the stockholders of the plaintiff corporation.

11. The defendant, Bayview Realty, Inc., was required as property management agent for the

plaintiff corporation to secure and deliver a bond in the sum of \$10,000.00. The latter failed to complete the usual application required by the United Pacific Insurance Company, which issued such bond for a term of three years from October 3, 1951. Efforts to secure such application from said Bayview Realty, Inc., were without avail. The cost of the premium on said bond was finally billed on December 20, 1951, to Fairview Development, Inc., plaintiff in this case. Said defendant Bayview Realty, Inc., and its officers, said defendants Cole and Nowell, refused to sign said application or to furnish a financial statement. In view of such failure and lack of co-operation said United Pacific Insurance Company under its right of cancellation cancelled said bond on April 25, 1953, and returned the unearned premium under said bond.

12. Contrary to the statements contained in Mr. Cole's affidavit, paragraph 11 thereof, filed in this cause, said individual defendants, Messrs. Cole and Nowell, were not required to manage said Fairview Manor, since by agreement said management was to be in Bayview Realty, Inc.; they have not used their best efforts and energy in managing said project; and there was no danger of said project becoming insolvent, or being unfit for occupancy or falling into the control of the mortgage holder, under other management. Mr. Cole has spent extended periods between November, 1951, and the date hereof in Seattle, Washington; Washington, D. C.; California, and other places away from the Fairview

Manor project. Mr. Nowell has only made token visits to the Fairview Manor project during that same period and has only spent limited time in its management. The undersigned is informed and believes and, upon such information and belief, states the facts to be that Mr. Nowell has had full time employment on a position located some distance from the City of Fairbanks.

13. Contrary to the statements contained in paragraph 14 of said affidavit of Mr. Cole, no salaries were authorized to Mr. Cole or Mr. Nowell by the stockholders or by the board of directors, and were not justified or authorized merely by reason of the fact that they were acting as officers of said corporation.

14. The occupancy of apartments referred to in paragraph 15 of Mr. Cole's affidavit by the defendants, Messrs. Cole and Nowell, were not authorized by the board of directors or by the stockholders of the plaintiff corporation. As previously stated Mr. Nowell made only token visits to said project and had a full time occupation located some distance from the City of Fairbanks.

15. The undersigned has not received notice of stockholders' meetings or corporate reports or accounts' reports referred to in Mr. Cole's affidavit.

16. That contrary to the statements made in the affidavit filed in the above-entitled cause by Everett Nowell, defendant, concerning failure of the individual plaintiffs herein as the successors to the

general contractor to discharge their responsibilities by permitting the liens hereinafter mentioned to be filed, the undersigned declares that all such responsibilities have been performed and discharged as hereinbefore stated, and that said liens resulted from disagreements between the general contractor and the subcontractors, and claims of the general contractor against said subcontractors. The said affidavit of Everett Nowell refers to the following liens:

“a. Lien claim of A. G. Rushlight & Co., a corporation, in the sum of Three hundred fifty-six thousand four hundred three & 85/100 (\$356,403.85) Dollars plus interest and costs, filed December 19, 1951.

“b. Lien claim of Clem Pilip, d/b/a Pilip Company, in the sum of Seventy-seven thousand six hundred and eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed January 21, 1952.

“c. Lien claim of C. H. Keaton, d/b/a Keaton Paint Company, in the sum of Seventeen thousand three hundred thirty-nine and 44/100 (\$17,339.44) Dollars plus interest and costs, filed February 16, 1952.

“d. Lien claim of Pilip & Butt Painting Contractors, Inc., in the sum of Seventy-seven thousand six hundred eighty-one & 62/100 (\$77,681.62) Dollars plus interest and costs, filed March 3, 1952.”

The lien mentioned under subparagraph (a) above is involved in the two suits heretofore men-

tioned in paragraph 9(a). The lien mentioned under subparagraph (b) above was filed by error and disclaimed by Clem Pilip in writing in the Rushlight case pending before this Court. The lien mentioned in subparagraph (c) is that of a subcontractor of Pilip & Butt Painting Contractors, Inc. Both the liens mentioned in subparagraph (c) and (d) above are involved in the Rushlight case pending before this Court and in the case above mentioned in paragraph 9 (a)(2).

Said liens have not been allowed as stated in said Everett Nowell's affidavit and have not placed the ownership of said project in jeopardy, since the individual plaintiffs have fully protected the plaintiff corporation against said liens by cash deposit of funds pending determination of the litigation involving said liens, and said liens have not endangered the good relationship with loaning institutions or the success of the entire corporation since no new loans are required and since the plaintiff corporation is fully protected against said liens.

6. That a disinterested person should be appointed by this Court to conduct and control the affairs of said corporation and preserve and maintain its assets and funds for the equal protection of all parties to this cause of action and until entry of the final decree of this Court; and that pursuant to the prayer contained in the complaint filed in the above-entitled cause, and under the general laws of the Territory of Alaska, the plaintiffs, jointly and severally are entitled to the appointment of a re-

ceiver for the property of said corporation, Fairview Development, Inc., to collect the rents, issues, income and profit thereof during the pendency of this action and until final decree of this Court, and to protect and preserve said property and the interests of said corporation and the interests of all of the stockholders of said corporation; and to the entry of a temporary injunction restraining and enjoining said defendants, Cash Cole and Everett Nowell and Bayview Realty, Inc., as prayed for in the complaint filed herein.

Dated at Anchorage, Alaska, this 12th day of August, 1953.

/s/ FRANK V. HENDERSON.

Subscribed and sworn to before me this 12th day of August, 1953.

[Seal] /s/ RALPH P. WOODY,

Notary Public in and for the
Territory of Alaska.

My commission expires: 5/4/55.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF J. F. CAMPBELL

State of Washington,
County of King—ss.

J. F. Campbell, being first duly sworn, on oath deposes and says: I am a Vice President of Seattle

Trust and Savings Bank and the author and signator of that certain letter dated June 30, 1953, addressed to Fairview Development, Inc., Fairview Manor, Building #2 Office, Fairbanks, Alaska.

This affidavit is made for the purpose of setting forth the facts on which the statements made in the following paragraph of that letter were predicated, to wit:

“First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face, one can not help but admire the management’s approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.”

On, to wit, June 6 and 7, 1953. affiant, at the request of the mortgagee, Institutional Securities Corporation, which holds the mortgage on the Fairview Manor in Fairbanks, Alaska, inspected the mortgaged property for the purpose of determining whether or not the mortgaged property was in actual operation, whether or not it was being maintained and protected, and to ascertain whether or not waste was being committed on the premises, and thereafter affiant reported in writing on his findings and

observations to Mr. Paul C. Henderson, Assistant Secretary, Institutional Securities Corporation, 60 East 42nd Street, New York 17, New York, the mortgagee, by letter of June 11, 1953, a copy of which is attached to this affidavit, denoted as Exhibit "A" and by this reference made a part hereof as fully as if set forth at length herein.

In commenting on improvements and management in the letter of June 30, 1953, affiant intended only to indicate that from the standpoint of the mortgagee any improvements which enhanced the value of the mortgage security were acceptable without giving consideration to the reasonableness of the costs or the necessity therefor.

/s/ J. F. CAMPBELL.

Subscribed and Sworn to before me this 11th day of August, 1953.

[Seal] /s/ HARRIET WATCHIE,
Notary Public in and for the State of Washington,
Residing at Seattle.

(Copy)

EXHIBIT "A"

Seattle Trust and Savings Bank
Second Avenue at Columbia Street
Seattle 4, Washington

11 June, 1953.

Mr. Paul C. Henderson, Assistant Secretary,
Institutional Securities Corporation,
60 East 42nd Street,
New York 17, N. Y.

Re: ISC Trust No. T241-1,
Fairview Manor,
Fairbanks, Alaska,
FHA Project #130-42013.

Dear Mr. Henderson:

Annual Inspection—June 6 & 7, 1953

En route to Fairbanks for this inspection, I stopped at Juneau, for a discussion of responsibilities for current conditions at the project and of problems to be encountered in gaining information. I held a conference with Messrs. Carroll, Smith and Magnuson, Regional Director, Chief Underwriter, and Chief Appraiser, respectively, of the FHA in Alaska.

From FHA's viewpoint, the construction was completed satisfactorily and in accordance with specifications. Sufficient personnel has not been available, in the territory, to supervise with extreme care

Exhibit A—(Continued)

and attention the multitude of construction being completed; however, reasonable care and attention to details has been given to assure that substitutions when necessary have complied with territorial building standards and requirements. FHA officials in Alaska, however, concur with the management's actions for some of the improvements and betterments made since construction was completed, and they acknowledge that current information on some of the expense items would now direct higher estimates in its project analysis.

It may be proposed and proved that errors in design and mechanical engineering have contributed greatly to the problems encountered in this first year's operation. It may be shown, also, that construction and mechanical installation errors or inadequacies have contributed largely to operational difficulties during the period under review. Regardless of the causes, however, it is certain that a large amount of income has been used to purchase additional equipment for operation of the apartment, and no small amount has been expended to make seemingly necessary repairs or changes.

A very large part of Fairview's troubles, regardless, rests in the management's attitude and approach to its problems. I shall not go into detail of the background or personalities involved, as such is controversial and one upon which I do not feel qualified to pass judgment. You are aware that Fairview Development, Inc., was organized by Mr.

Exhibit A—(Continued)

Cash Cole of Fairbanks, Alaska—Mr. Everett Nowell of Alaska and Seattle—and Mortensen Construction Co., of Seattle. I am advised that Mortensen controls 50% of the common stock, and that Cole and Nowell hold the remainder. Stock records were not available for inspection, but there is no common stock outstanding according to the financial statement of December 31, 1952. Mr. Cole, however, is in active control and is responsible for the management of the project. He still appears of record as the corporation's secretary.

Mortensen incorporated a separate company for Alaska operations and entered into an agreement with Fairview for the construction of the apartment property. Claims and counter-claims have been and still are being made about every phase of the development. Troubles began at the outset and have continued. There are at least three separate legal actions pending, viz: Fairview vs. National Bank of Commerce, Seattle, to return to Fairview funds paid to Mortensen; Mortensen vs. Cole and Nowell, to turn over to him the management of Fairview Manor; and Rushlite, the plumbing contractor, vs. Mortensen for funds due on the construction. These matters will, we hope, be settled in court in the near future but it is difficult to forecast the probable result or at what future date peace and harmony might prevail.

In the meantime, Fairview Manor has suffered and will continue to do so until management de-

Exhibit A—(Continued)

termines to apply itself to the economic problems that must be faced, or until some other compelling force is brought into the controversy to preserve existing equities and the security of your investment.

I have advised the FHA officials in Juneau, and Mr. Cash Cole, Secretary of the corporation, in no uncertain terms that your position will be one of demanding timely performance under your note and mortgage, and have presumed to inform them that in my opinion it will be much to your benefit to cash out by assignment to the FHA at the first opportunity.

My role has been explained to them as one of a reporter passing on to you the information as I saw it. All of the information I have which is contained in this report is undenied by the management. They have seen my complete working papers, and I have told them quite bluntly my thought of the situation, bearing in mind always that we have had no part in any way in the problems which the management itself can not resolve so far as their differences are concerned.

Before going north, I compared the operating analysis which you prepared, with the project analysis, reducing it to a per room per annum cost, and was successful in obtaining comparable figures on another project in Fairbanks for comparison. I must say that the comparing unit is not as large, neither is it in as good physical condition as Fair-

Exhibit A—(Continued)

view Manor; however, I quote the following comparisons for whatever value they may be to you in analyzing my findings:

Re: Fairview Manor

Per Room—Per Annum, 1952

	Project Analysis	Fairview Manor	Comparable
Renting Expense	\$ 1.00	\$.04	\$ 2.10
Administrative Expense	31.26	72.19	26.89
Operating Expense	76.56	158.04	102.13
Maintenance Expense	61.40	58.34	50.60
<hr/>			
Total Operating Expense	\$ 170.22	\$ 288.61	\$ 181.72
<hr/>			
Real Estate Taxes	\$ 72.40	\$ 53.71	\$ 21.25
Reserve for Replacements	\$ 25.28	\$ 25.28	\$ 19.65

Below is a detail of my examinations of the records and operation of this project:

Administrative Expenses

Management: \$23,000.00.

Mr. Cash Cole, the active manager, drew a salary of \$1,000.00 per month for the entire year of 1952. Mr. Nowell was paid the same salary for eleven months of the year, but has not drawn that amount since November, 1952.

Superintendent and Manager's Salary: \$2,700.00.

During the early part of the year, it was necessary for Mr. Cole to be absent from Fairbanks so Mr. Nowell secured the services of a manager on a tem-

Exhibit A—(Continued)

porary basis, who was paid the amount of \$2,700.00 which is listed as manager's salary.

Clerical: \$7,481.49.

A bookkeeper is hired at the rate of \$400.00 per month, plus her apartment at \$150.00 per month; and Mrs. Cash Cole receives a payment of \$200.00 per month for showing apartments. The remaining items contained in that amount are all relatively unimportant.

Telephone & Telegraph Expenses: \$2,422.44.

This is high because of the habit of the management when they are away from the project to use long distance at regular intervals.

Legal and Auditing Expenses: \$12,784.41.

The firm of Pritchard & Lofquist of Seattle, was employed on January 1, 1952, and continued through the year of 1952, at \$500.00 per month. That service was discontinued on January 1, 1953. One firm of attorneys was employed to bring suit against the National Bank of Commerce and were paid a preliminary retainer fee of \$2,500.00. Another attorney has now been employed to pursue the same action and he was paid during 1952 a preliminary retainer fee of \$1,000.00. Both of these were Seattle attorneys. A local attorney in Fairbanks has been paid for normal legal work in collecting rents, etc., and for preparing certain instruments; however, that is relatively small in proportion, as the three items

Exhibit A—(Continued)

above make up the majority of this total expenditure.

Office Expense and Manager's Expense: \$5,023.77.

This represents stationery, printing, supplies, and other items normally charged to this account; and the Manager's expense is primarily for travelling on the part of the managers and other personal expenses chargeable.

Miscellaneous: \$4,021.22.

This is the catch-all for several things, most of which represents additional expenditures of the management for their personal uses.

Operating Expenses

Heating and Ventilating: \$32,128.99.

This represents charges for fuel and materials purchased for the actual heating plant. As you know, these are coal-burning furnaces, and the expense shown here is not out of line for that territory, if that were the entire heating expense under proper cost accounting.

Janitorial Expenses: \$2,079.04.

This represents the charges for janitor supplies only.

Lighting and Miscellaneous Power: \$15,890.32.

This represents charges in the main by the City of Fairbanks which furnishes power at the rate of

Exhibit A—(Continued)

eight cents per KWH, which compares very poorly to power here in the City of Seattle at less than two cents per KWH. This cost represents \$19.66 per room per annum as compared to \$8.00 per room per annum on the comparable property above referred to; however, it must be remembered that we have in Fairview Manor a cost for common hallways in the basement, and hall lights to be maintained throughout the several entrances to the individual sections of the project; in addition, it has been necessary to maintain floodlights as there are no city lighting facilities in this area.

I am advised that the meters used by the City of Fairbanks are 220 amp. meters yet the current is actually only 208. When the City works out its meter problems it is anticipated that the power charge will increase as much as 20%. This is a deplorable situation, but one which I believe management can do little about, and it is of course an item upon which the project analysis erred badly.

Water: \$1,833.96.

Inasmuch as the project furnishes its own water, and all expenses therefor are covered under Power, the amount spent here represents only salt purchased to use in the softening process. They are now attempting to soften the water by an electrical process and salt is not being added at the present time.

Power Plant Expense: \$190.38.

Represents oil purchased for the auxiliary plant.

Exhibit A—(Continued)

Garbage: \$50.00.

This is the amount paid to the City of Fairbanks, and their explanation of the small amount for garbage collection service is that it is handled by one of the maintenance men with their own equipment so that the majority of that expense is contained in the payroll. It is impossible without a detailed audit to arrive at any proper figure.

Payroll: \$71,680.32.

This amounts to \$88.71 per room per annum as compared to \$38.91 on the comparable. However, included in this figure are proper charges for additions and betterments made by management in order to keep the buildings in fair operating condition. Many of these repairs and changes will be discussed in a subsequent paragraph. They are essentially completed, and I am advised that the payroll as of June 15, 1953, will be as follows:

	Per Month
One Ass't. Manager—\$800 plus \$165 for apartment	\$ 965.00
Three Firemen, \$500 each plus \$150 for apartments	1,950.00
One Maintenance Man, \$500 plus \$150 for apartment	650.00
One Maintenance Man (Carpenter) at \$3.50 per hour	725.00
Four Hall Girls—each at \$60.00 per week	1,080.00
Total	<u>\$5,370.00</u>

or a per annum total of \$64,440.00.

Exhibit A—(Continued)

Approximately the same amount of labor was employed last year. We therefore can only deduct that the difference between that figure and the \$71,-680.32 represents approximately the amount of labor expended on improvements, and should be non-reoccurring after June 15th of this year.

Miscellaneous Expense: \$2,607.48.

Contains various items which did not appear to be out of line with normal operation.

Gas, Oil and Grease: \$1,271.33.

Is for the automotive equipment composed of two pick-up trucks used by the manager and assistant manager for all transportation; a dump truck used for hauling garbage and ashes; and a Cletrac used for snow clearance.

Maintenance Expense

Decorating: \$5,795.95.

This is for materials used in decorating and for a few contracts let to decorate individual apartments which were badly in need of freshening up. The project analysis provided \$19,168.00 per annum for decorating, which would amount to \$23.72 per room per annum. Fairview Manor spent \$7.17 per room per annum, and the comparable spent only \$1.45; however, the comparable is not in good shape, and it is in this category primarily that I believe the comparable should be disregarded, as the total main-

Exhibit A—(Continued)

tenance expenses of only \$50.60 as against Fairview's \$58.34 is badly out of line.

Repairs: \$23,248.48.

Amounts to \$28.77 per room per annum while the comparable shows \$23.89, each figure being about three times the project analysis estimates. Please refer to Fairview's letter to you of March 18th, the first page of which lists improvements made to the extent of \$113,745.79. All of that amount of money was expended during 1952 except for the sum of \$2,437.51 on the power plant and one-half of the real estate taxes paid during construction. Of the total amount of \$113,745.79, \$54,643.62 was capitalized, leaving expenses of \$59,102.17 from which we deduct \$31,612.00 for the taxes, which leaves the sum of \$27,490.17 representing expense during the year. Naturally, some of this is classified differently but the repair item of \$23,248.48 is made up principally of the items listed in the above mentioned letter and further explained to you by Mr. Lofquist in his recent letter. Many of the items expensed might properly be capitalized; however, I assume that their accountant has felt that they were proper charges to expense from a tax standpoint and classifications as made may have some bearing on the pending litigations. The items listed in the above letter I examined, and to the best of my ability they seem to be proper expenditures under the conditions outlined, and I really think that management

Exhibit A—(Continued)

can be criticized only for having done so without full knowledge of where funds were coming from to provide for proper payment.

I believe all of the other items contained in the analysis of expenses are self-explanatory and reasonably in line, with the exception of the real estate taxes estimated by the FHA at \$58,500.00, but assessed and currently being paid at the rate of \$43,400.00, which is \$53.71 per room per annum, while the comparable property is paying only at the rate of \$21.25 per room per annum. I think management has the problem of appearing before the Board of Equalization in attempting to prove that its taxes are out of line as compared to this similar project, because the per room per annum tax should not vary such an amount as the buildings provide comparable living accommodations and produce comparable incomes.

Please refer to the financial statement of December 31, 1952, under Fixed Assets and find Building Equipment, fixed—\$47,208.14; and Building Equipment, portable—\$5,112.30. Income is diverted for the purchase of this equipment and the improvements as follows: Generators for an auxiliary power plant—Fire extinguishers—Coal conveyors—Ash removers—Meter Cabinets—Storm-window Racks—Power Plant Additions—Vents—Storm Doors—and a new Well. I examined all invoices, and they appear to be in order. The amounts expended are for materials only except for the installation of the generators.

Exhibit A—(Continued)

With their own labor they have prepared and installed the remaining items.

The second well, which has been a bone of contention, is now down 309 feet but is charged to Building Equipment, Fixed—only to the extent of \$2,767.60. The total paid during 1952 was \$4,959.01. That not charged above has been expensed. They do not have water yet, and there is a probable amount due the well driller at this time of \$3,920.00; and it is anticipated that the maximum amount required to produce water would be another \$2,200.00, plus house and connections of \$1,000.00, or a total cost of \$12,079.00. This is conditioned upon their being able to produce water with the present drilling equipment and provided also that a screen is not necessary when the well is completed. If they are unfortunate in these two latter matters, a \$2,000.00 additional cost is estimated.

Charged to Building Equipment—Portable, are meters for the washing machines of \$1,110.05; new small water pumps, \$3,460.04; a bar for Mr. Nowell's apartment, \$455.49; and laundry room carts of \$86.72.

One thing additional regarding Fixed Assets: Furniture and furnishings of \$4,124.25 and \$3,410.88—Funds have been expended for those items for the personal apartments of Mr. Cole and Mr. Nowell.

I have no particular comment to make on the

Exhibit A—(Continued)

other items contained on the balance sheet. Many of them that I have made no comment on are relatively unimportant; however, I do think that they reflect in some degree the management's philosophy. I might point out that the amount shown as Due Tenants is not advance rental but is a surety of one month's rent taken to protect the owners against needed repairs at time of vacancy; in any event, prudent management would retain those funds in a depository and not use them in any way for operating expenses or capital outlays. As of the date of my inspection, there was about \$10,000 of cash on hand and in the bank, with all bills paid. It must be remembered that approximately \$30,000 of rental income was lost during the first three months of 1952, due to vacancies, and current bills were not paid because of lack of funds during that period.

If you will now please refer to the second page of Fairview's letter of March 18th, I want to comment briefly on the figure of \$64,375.00 of anticipated expenditures. I do not doubt that \$7,500 worth of additional insulation should be applied to prevent heat loss; however, I believe that the installation of vents on all sections of the buildings will eliminate the icing condition.

There is no question but that an error was made by someone in permitting this project to be completed without sufficient vents in the attic space when the insulation was applied in between the ceil-

Exhibit A—(Continued)

ing joists. On the top floor of this apartment you can count every nail used to secure the sheet-rock and although they are not protruding, they are visible because during the extreme cold the nails caused condensation in the apartments which in turn gathers dust and leaves the nail-heads clearly visible. The same condition exists on exterior walls.

Item #2 of the letter has already been commented on, and bear in mind I am no engineer, but I do know that the City of Fairbanks does not furnish water and that this unit must be self-sufficient. I am told that two or three times throughout the first year's operation, it became necessary to pull the pumps and examine the strainers as water was not available in sufficient quantity to maintain the apartments. I am also told that the water pipes were arranged to pump from two wells, and that they now are not of sufficient size in all of the locations to handle the required amount of water for the several units, from one central location. Water is a serious problem in that territory, and there is very little good water. Fairview water seems to be better than average, and it is hoped that they will, with their second well, secure sufficient water with their current undertaking.

Item #3—Surface Drainage and Repair Work. I am told this project was constructed upon a floating slab of reinforced concrete, no attempt being made in that situation to eliminate permafrost or to get beneath it. There is every evidence that these buildings

Exhibit A—(Continued)

and appurtenances are constantly subject to some slight shifting or what is known in that territory as "heaving." The freezing conditions seemingly shove certain parts of the building up and at a later date they drop down in small amounts, which causes difficulty in some of the interiors necessitating numerous changes on door clearances, etc., but it seems to be particularly damaging to the concrete walks and driveways. If you will refer to the plans, you will find that the garages are in the rear of these units and that concrete driveways and curbs were provided. In addition to some breakage of that concrete, they were not laid with proper drainage in mind, or the elevations have changed, due to the heaving. Each of the front sidewalks approaching the individual sections of each of the four buildings is at or below grade and there should be some corrections made; however, I do not think it will be necessary to expend as much as \$9,500.00, and thinking that this figure is only being thrown at you as a comparable figure to that which they are claiming against the contractors, I have suggested to them that they cover the entire site of the sidewalk area with sufficient asphalt to bring it to the level of the first step on each front stoop, giving that asphalt a slight crown for drainage purposes, and that approximately 250 sq. ft. of the concrete behind Bldg. #2 be removed so that drainage can be corrected to eliminate the melting snow, etc., from going directly into the basement and boiler room of Bldg. #2.

Exhibit A—(Continued)

Item #4 of this section of Fairview's letter calls for additional pipe insulation to prevent sweating, on which they anticipate expending \$6,500.00 and they have a bid for that amount. The water which comes from these wells is under 33 degrees temperature and exposed pipes naturally will at certain points of humidity sweat badly, and they have experienced some claims by tenants where materials in their lockers were badly damaged. They are now experimenting with a cork and rubber insulation which can be applied much like paint and it appears to be working. I would estimate that if this continues to be successful under year-round conditions, a cost of \$1,000 for material will make this correction.

Last but not least, of their anticipated expenses is the cost of replacing aluminum roof where damage was caused by ice removal, at an estimated price of \$25,875.00. This again represents a figure which they might claim against the contractor; however, I examined the roof and can find little damage. The ridgepole cover on a portion of Bldg. No. 2 has been badly dented and should be examined further to make sure that it is water tight, and that may need to be replaced. There are some hatchet or ax holes down near the overhang where the icing condition was the most extreme, but I have suggested to them, and I think that they can, with a reasonable amount of immediate attention, prepare aluminum patches which can be applied and

Exhibit A—(Continued)

will give this roof its normal permanent life. Many nails are extended, and a screw-type of nail has been recommended in replacing those, to assist in holding the roof down under extreme climactic conditions. In this area, were they subject to severe windstorms, I would think the nailing down of the roof would be an emergency matter at this time.

I have prepared the usual type of inspection reports, one on each of the four individual buildings. Each building, as you know, contains eight (8) sections, and the maintenance items that I have referred to are by sections within the individual buildings. These inspection reports are enclosed. Occupancy at this project is 100%—all apartments occupied or spoken for.

According to my understanding, the grounds were supposed to be landscaped and planted. There is no grass growing on this tract except in one or two isolated places, and the grading is improper. You may deem it advisable to insist that this ground be properly seeded in order to give the property a proper approach from a competitive standpoint. You must bear in mind, however, that this would call for the additional expense of maintaining the lawn.

In the heart of the business area, two 608 multiple story projects have been completed during the past two years. I inspected those also, and they appear to be in good condition, and are 100% occupied. I am advised that they suffered the same loss in income

Exhibit A—(Continued)

during the past winter that the subject property suffered. Rentals in the downtown area for comparable space are about \$25 to \$30 per apartment more than Fairview Manor.

Immediately across the street from Fairview Manor, 150 duplex units are being constructed this year, and it is anticipated that their rental schedule will be comparable to that of Fairview Manor.

Attempts are being made to arrange for another 608 directly across the street from Fairview Manor. The success or failure of these negotiations were not available to me.

Generally speaking, the City of Fairbanks, with a population of 30,000 appears to be thriving, as a tremendous amount of government work is being done there. Additional military housing is being planned, and the bases are continuing to be expanded.

I apologize for this lengthy letter, but I know of no other way in which to bring the problem to you, and there are still no doubt many questions that I have left unanswered. Obviously, we shall be happy to attempt to secure an answer for you on any particular matter that you feel is important.

I have told the management that their request for funds out of the Reserve for Replacement Account is being denied, and I have also told them that we feel it is essential that a definite program be worked

Exhibit A—(Continued)

out and communicated to us, for a steady and orderly decoration of the interior of the buildings and also that the exteriors not be permitted to suffer.

By comparison with other frame buildings in the Fairbanks area, this is a beautiful project; however, I do not think that it should be judged from a distance, and I feel that you should to some degree, insist upon the proper maintenance of your security. We await your instructions and stand ready to communicate them to Fairview Manor, and to report to you upon the progress they have made.

In accordance with our agreement, you are to reimburse us for my transportation cost to and from Alaska. The cost of the round-trip by air was \$186.30, as per the Northwest Airlines schedule attached, and we shall appreciate your check to us for that amount to cover.

Yours very truly,

/s/ J. F. CAMPBELL,

Vice President and Manager,
Mortgage Loan Department.

JFCampbell:

awe

Via air mail

cc: Mr. C. A. Carroll,

FHA Terr. Director, Juneau.

Exhibit A—(Continued)

(Copy)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#1)

(Sidewalks below grade)

G.—Good

F.—Fair

Rep.)—Necessary

Nec.)—Repairs

Exterior Condition

	G.	F.	Rep. Nec.
Sidewalk		x	
Driveway		x	
Masonry	None		
Stucco	None		
Siding		x	
Windows		x	
Doors		x	
Exterior Painting			x
Chimney			
Leaders and Gutters		None	
Roof		x	
Fire Escapes	None		
Garage	x		
Grounds			x

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators			
Basement	x		
Heating	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim	x		
Walls (inside)		x	x
Ceilings		x	x
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

Describe repairs necessary and state whether or not **urgent**:

Exterior paint—West End—Sec. "E."

Exterior paint—West End—Sec. "H."

Exterior paint—South Side—Sec. "H."

Interior Decorating Program must be established.

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

Exhibit A—(Continued)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#2)

(Sidewalks below grade)

G.—Good

F.—Fair

Rep.)—Repairs

Nec.)—Necessary

Exterior Condition

	G.	F.	Rep. Nec.
Sidewalk		x	
Driveway		x	x
Masonry	None		
Stucco	None		
Siding		x	
Windows		x	
Doors		x	
Exterior Painting		x	x
Chimney	x		
Leaders and Gutters		None	
Roof		x	x
Fire Escapes	None		
Garage		x	
Grounds			x

Exhibit A—(Continued)

Interior Condition			
	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators	None		
Basement	x		
Heating	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim	x		
Walls (inside)		x	
Ceilings		x	
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

State necessary repairs and whether or not urgent:

Exterior paint on West side Sec. "H" and South side of Sec. "H."

Exterior paint on East side Sec. "H" also on South side of Sec. "G."

Exterior paint on South side of Secs. "D" and "E."

Exterior paint on South side of Sec. "B" and on West side of Sec. "A."

Exterior paint on South side of Sec. "A."

(Ridge cover must be straightened.) Water gets into boiler room from rear driveway. Grade of drive should be changed to carry water away from the building—Sec. "G."

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

Exhibit A—(Continued)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#3)

(Sidewalks—Entrances—below grade)

G.—Good

F.—Fair

Rep.)—Repairs

Nec.)—Necessary

Exterior Condition

	G.	F.	Rep.	Nec.
Sidewalk		x		
Driveway		x		
Masonry	None			
Stucco	None			
Siding		x		
Windows		x		
Doors		x		x
Exterior Painting				x
Chimney	x			
Leaders and Gutters		None		
Roof		x		x
Fire Escapes	None			
Garage		x		
Grounds				x

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators			
Basement	x		
Heating (1)	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim		x	
Walls (inside)		x	
Ceilings		x	
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

Describe repairs necessary and state whether or not urgent:

Exterior paint—West End of Sec. "H."

Exterior paint—South side of Sec. "H."

Exterior paint—East side of Sec. "H."

(1) Change-over on 3-way valve complete this week.

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

Exhibit A—(Continued)

Institutional Securities Corporation

Reinspection Report

Exterior and Interior

Number: T-241-1

Date: June 7, 1953

Property: Fairview Manor—Fairbanks, Alaska (#4)

(Sidewalks below grade)

G.—Good

F.—Fair

Rep.)—Repairs

Nec.)—Necessary

Exterior Condition

	G.	F.	Rep. Nec.
Sidewalk		x	
Driveway		x	x
Masonry	None		
Stucco	None		
Siding		x	
Windows		x	
Doors		x	
Exterior Painting			x
Chimney	x		
Leaders and Gutters		None	
Roof		x	x
Fire Escapes		None	
Garage	x		
Grounds			x

Exhibit A—(Continued)

Interior Condition

	G.	F.	Rep. Nec.
Halls	x		
Stairways	x		
Elevators			
Basement	x		
Heating (1)	x		
Plumbing	x		
Hot Water Htr.	x		
Floors	x		
Doors and Trim		x	
Walls (inside)		x	
Ceilings		x	
Bathroom Floors	x		
Refrigeration	x		
Ranges	x		

Describe repairs necessary and state whether or not urgent:

Some driveways need replacing.

Exterior paint on South and West sides of Sec. "A."

Exterior paint on South and West sides of Sec. "B."

Exterior paint on South and West sides of Sec. "H."

(1) Complete change-over this week.

Occupancy: 100%.

Remarks: See transmittal letter of 6/11/53.

SEATTLE TRUST AND SAVINGS BANK,

By /s/ J. F. CAMPBELL,

Vice President and Manager
Mortgage Loan Department.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF J. E. SWANSON, JR.

State of Washington,
County of King—ss.

J. E. Swanson, Jr., being first duly sworn on oath, deposes and says: That he is a citizen of the United States and of the State of Washington, over the age of twenty-one years, not a party to the above action and competent to be a witness therein. That he makes this affidavit in opposition to the affidavit of Cash Cole herein dated August 3, 1953, and purporting to be subscribed and sworn to by Cash Cole on August 3, 1953, before John E. Hedrick, Notary Public in and for the State of Washington, residing at Seattle. That he has read the said affidavit of the said Cash Cole and has likewise read a certain affidavit of Everett Nowell, dated August 3, 1953, purporting to have been subscribed and sworn to by the said Everett Nowell before John E. Hedrick, Notary Public in and for the State of Washington, residing at Seattle, on August 3, 1953, and that affiant makes this affidavit in opposition to the affidavits of the said Cash Cole and the said Everett Nowell as aforesaid.

That specific reference is made to paragraph 19 of the affidavit of said Cash Cole. That affiant was present at the said meeting of October 29, 1952, in Fairbanks, Alaska, referred to in said paragraph 19 and was present as an observer. That affiant was present during the entire length of said meeting and paid particular attention to the proceedings and matters there occurring; that affiant had made notes

on said proceedings during the course thereof and immediately upon the conclusion of said meeting, transcribed a full, complete and accurate record and account of the proceedings there taking place. That said account as transcribed by affiant is denoted "Exhibit A," attached to this affidavit, and by this reference is made a part hereof as fully as if set forth at length herein.

That affiant has been associated with Nelse Mortensen, Cliff Mortensen and Frank V. Henderson since July 1, 1952, and devotes his full time to their business interests. That affiant is thoroughly familiar with the affairs of Fairview Development, Inc., and the conflicts that have existed between Everett Nowell and Cash Cole on the one hand and Cliff Mortensen, Frank V. Henderson and Nelse Mortensen on the other hand relating to the affairs and management of Fairview Development, Inc., and the project known as Fairview Manor at Fairbanks, Alaska. That from July 1, 1952, down to the present, affiant noticed a constant conflict and difference of opinion between the said Nowell-Cole interests on the one hand and the Mortensen interests on the other, resulting in an utter deadlock on the Board of Directors of Fairview Development, Inc., and an inability of said Board of Directors to take any action for the welfare of said corporation.

/s/ J. E. SWANSON, JR.

Subscribed and Sworn to before me this 10th day of August, 1953.

/s/ HERMAN HOWE,

Notary Public in and for the State of Washington,
Residing at Seattle.

EXHIBIT A

(Copy)

October 29, 1952.

Memorandum of the Events Which Transpired at a Special Meeting of the Board of Directors of Fairview Development, Inc., held October 29, 1952, at 2:00 p.m. in the Office of Fairview Manor in Fairbanks, Alaska.

Those present at the meeting were:

Everett Nowell, Director;

Cash Cole, Director;

Cliff Mortensen, Director;

Josef Diamond;

J. E. Swanson, Jr.

The meeting was called to order by Everett Nowell who stated that the purpose of the meeting was to discuss the utilities problem at Fairview Manor. Everett Nowell led the discussion relative to the power situation and recommended installation of a power plant at Fairview Manor to continuously provide full power requirements for Fairview Manor. Everett Nowell then presented a plan for the installation of certain specific power generating equipment. This presentation, a copy of which is attached to this memorandum, was recorded by Everett Nowell on a dictaphone. Immediately following Mr. Nowell's presentation, the transcription was played back to the group. At the conclusion of the play-back Mr. Cole pulled the dictaphone plug from the wall outlet in the office.

Exhibit A—(Continued)

Mr. Mortensen replaced the plug stating that it might be desirable to record further matters to be considered at the meeting. Mr. Cole angrily removed the plug and stated that he refused to remain at the meeting if the dictaphone were left on. Mr. Nowell's presentation was then extensively discussed by the Directors. Questions of finance were also discussed.

Cash Cole then led a discussion relative to the coal situation and recommended the installation of stand-by oil burners for use if coal should be unavailable during the coming winter months. This presentation was also extensively discussed by the Directors.

Cliff Mortensen stated that because of the large capital outlay that would be required to make the suggested installations he felt that the matter should be presented to the stockholders at a regular stockholders' meeting. Cash Cole then stated that he wanted the installations made immediately; that he didn't intend to be hindered by the stockholders among whom no agreement had ever been reached and that he did not intend to stand for any further robbing of Fairview Manor by the Mortensens. Josef Diamond remarked that he thought Cash Cole was the one who was milking the corporation. At this point, Cash Cole launched a stream of profanity and abusive language directed against Josef Diamond and Cliff Mortensen, removed his glasses and threatened to strike Mr. Diamond who was seated in the room. When Everett Nowell and Josef

Exhibit A—(Continued)

Diamond attempted to restrain Cash Cole and prevent him from starting a fight, Cash Cole turned on Cliff Mortensen and attempted to start a fight with him. While Mr. Nowell, Mr. Mortensen and Mr. Diamond were attempting to restrain Mr. Cole, he ran to the door of the office, opened it, shouted that there was a fight and that there were three to one against him, and called for someone to come to his aid. Shortly thereafter Mr. Cole calmed down and resumed his seat at the Directors' meeting.

Everett Nowell resumed the discussion of the utilities problem following which Cash Cole moved that the Management of Fairview Manor be given authority to do anything which it felt necessary, including the purchasing of equipment and the borrowing of such sums of money as was felt necessary and to do all other things which the Management deemed necessary to remove the danger of the development of a critical heat and power situation at Fairview Manor. Cliff Mortensen stated that the motion would be more acceptable if it were put in a form which framed a definite proposal as to what steps would be taken by the Management to prevent a critical utilities situation from developing. Mr. Mortensen stated that as presented the motion would give blanket authority to the Management to take any steps desired with regard to the heat and power at Fairview regardless of the cost of such steps. Cash Cole then repeated the Motion. Everett Nowell called for a vote. Everett Nowell and Cash Cole voted in favor. Cliff Mortensen voted against.

Exhibit A—(Continued)

Cash Cole then moved that the meeting be adjourned. Everett Nowell and Cash Cole voted in favor of the motion. Cliff Mortensen voted against the motion. Cash Cole then stated that the meeting was adjourned. Cliff Mortensen pointed out that under the Directors' voting agreement he had one vote and Cash Cole and Everett Nowell together had one vote and that therefore the meeting was not adjourned. Cliff Mortensen further stated that he had certain motions that he desired to make. Mr. Mortensen then moved that there be made available for consideration by the Board of Directors a full and complete report of all financial transactions of the corporation, including an itemized statement of its income and expenditures from the date of its inception to the present time. After a discussion, during which Everett Nowell and Cash Cole stated that a financial statement would be made available, Cliff Mortensen moved that the meeting be adjourned to meet in the office of the CPA of the Corporation, Herb Lofquist, Seattle, Washington, on November 12, 1952, at the hour of 2:00 p.m. in order that the Board of Directors could probably consider the financial affairs of the Corporation. Following an extended stream of abuse from Cash Cole, Cliff Mortensen requested that Everett Nowell, who was acting as President, call for a vote on his motion. Cash Cole stated that the meeting had been adjourned. Everett Nowell refused to call for a vote on the ground that the meeting had been adjourned. Cliff Mortensen then moved that in the event that

Exhibit A—(Continued)

any motions made at the meeting could not be acted upon because of a deadlock among the Directors that all such matters be referred to Ken Kadow for his decision in accordance with the agreement of the Directors dated June 16, 1950, and that the decision or the determination made by Ken Kadow be adopted as the action and decision of the Board of Directors of this Corporation as agreed to by the Directors, and in the event that Mr. Kadow was not available, that such matters be referred to Roy Sumpter for his decision and determination, all in accordance with the agreement of June 16, 1950. Cash Cole then launched a further stream of profanity and abuse directed against the Mortensen interests and Mr. Diamond threatened Cliff Mortensen with criminal action, and threatened to disbar Mr. Diamond. Mr. Cole then stated that the meeting had previously adjourned, that no further business would be considered by the Board of Directors and Mr. Cole then walked out of the meeting. Everett Nowell remained at the meeting but stated that he would refuse to consider any further motions on the ground that the meeting had been adjourned.

Mr. Mortensen moved that Cash Cole and Everett Nowell each of them be required forthwith to return to the Corporation all monies withdrawn by either of them or taken by either of them from the Corporation whether by way of alleged salary or alleged expenses or otherwise, and that a full and

Exhibit A—(Continued)

complete accounting certified by a CPA for the Corporation be rendered as to all sums drawn by or charged to the Corporation by either of them, and that Cash Cole and Everett Nowell be furnished copies of said accounting with copies to each of the directors and stockholders. Everett Nowell refused to act on this motion on the ground that the meeting had been adjourned. Mr. Mortensen then moved that Cash Cole and/or Everett Nowell and/or Bayview Realty, Inc., or either or all of them be removed from the Management or operation of Fairview Manor and that the Management of said project be placed in the hands of the Manager or Management selected by the Directors, or if the Directors could not agree, in accordance with the provisions of the agreement between the Directors dated June 16, 1950, when they cannot agree upon any action for the benefit of the Corporation. Everett Nowell refused to act upon this motion on the ground that the meeting had been adjourned.

At this point Mr. Cash Cole returned to the meeting and attempted to further disturb it by profane and abusive language. Mr. Mortensen moved that the minutes of the special combined meeting of stockholders and Directors held on June 11 and 12, 1951, be recognized as the lawful minutes of the Corporation and that they be placed in full force and effect as provided therein. Mr. Nowell refused to consider this motion on the ground that the meeting had been previously adjourned. Cash Cole urged Everett Nowell to leave the meeting since no further busi-

Exhibit A—(Continued)

ness could be transacted. As Mr. Mortensen began to present an additional motion Mr. Cole and Mr. Nowell left the meeting. Immediately thereafter, Mr. Cliff Mortensen, Mr. Josef Diamond and Mr. J. E. Swanson left the office without further incident.

/s/ J. E. SWANSON, JR.

[Endorsed]: Filed August 14, 1953.

[Title of District Court and Cause.]

ORDER APPOINTING RECEIVER

This Cause Coming on to Be Heard on motion of the plaintiffs herein by its attorneys for appointment of a receiver and pursuant to the prayer of the complaint filed in this cause and upon the affidavit or affidavits filed in support thereof and in opposition thereto, and the testimony produced in open court; and the court having heard statements of counsel and being otherwise fully advised in the premises, Finds:

1. That this is a stockholders' suit instituted by the corporate plaintiff and certain stockholders on their own behalf and on behalf of other stockholders; and that this case involves the Fairview Manor, located at Fairbanks, Alaska, as more fully indicated in the complaint filed herein, and further relief is sought.

2. That it appears that Cash Cole, one of the defendants in this case, has become ill since the commencement of the trial herein and is unable to proceed with his testimony on behalf of the plaintiffs or on his own behalf; and that he has been one of the persons managing the operation of said Fairview Manor, and is now unable to so manage it in view of his illness.

3. That the plaintiffs have prayed for the appointment of a temporary receiver or a permanent receiver under their complaint; and have moved during the trial for the appointment of a temporary receiver until said defendant Cash Cole is able to appear at a trial in this court and testify under the subpoena issued at the request of the plaintiffs.

4. That the individual plaintiffs in this cause are owners of 50 per cent of the common stock of said corporation and seek, in addition to the appointment of a receiver, an accounting from the defendants Cash Cole, Everett Nowell and Bayview Realty, Inc.; and it appears that an impasse exists in the conduct of said corporation's affairs due to deadlock and dissension in the Board of Directors and among the stockholders; that there is uncertainty as to who comprise the Board of Directors; that there may be improper disposition of corporate funds and dissipation of corporate assets; that there may be impairment of corporate property and usurpation of control and possession of corporate assets, income and profits by the defendants and exercise by one or more of them of corporate powers without

authority of the Board of Directors and the stockholders, contrary to the provisions of the corporate charter, bylaws and the General Laws of the Territory of Alaska.

It Is Now Therefore Ordered, Adjudged and Declared that Robert E. Sheldon, of the City of Fairbanks, Alaska, be and is hereby appointed receiver for the property involved in the above-entitled cause, and all assets and corporate records of the plaintiff corporation and its business, together with all improvements located thereon, and the fixtures, equipment, merchandise, stock and personal property located therein, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases; that upon entering upon his duties said receiver shall file with this court a bond in the penal sum of \$30,000.00 as security, to be approved by this court, and conditioned upon the faithful performance of his duties as such receiver.

It Is Further Ordered that any party or parties now in possession of said premises, or that may come into possession of said premises and the improvements thereon, attorn to said receiver.

Dated at Fairbanks, Alaska, this 8th day of October, 1953.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed and entered October 8, 1953.

[Title of District Court and Cause.]

NOTICE OF WITHDRAWAL OF ATTORNEYS

To: Messrs. Lycette, Diamond & Sylvester, and to
Messrs. Collins & Clasby, attorneys for plain-
tiffs:

Please be advised that the undersigned attorneys,
Cake, Jaureguy & Hardy and Nicholas Jaureguy,
hereby withdraw as associate attorneys for defend-
ants Cash Cole, Everett Nowell and Bayview
Realty, Inc.

Dated this 15th day of December, 1953.

CAKE, JAUREGUY & HARDY,
/s/ NICHOLAS JAUREGUY,

Formerly Attorneys for
Above Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 17, 1953.

[Title of District Court and Cause.]

NOTICE OF DEFAULT AND DEMAND

To: Cash Cole, Fairview Manor Building No. 2,
Fairbanks, Alaska.

Bayview Realty, Inc., Fairview Manor Building
No. 2, Fairbanks, Alaska.

Fairview Development, Inc., Fairview Manor
Building No. 2, Fairbanks, Alaska.

Everett Nowell, P. O. Box 3365, Seattle 14,
Washington.

John E. Hedrick, Attorney for Everett Nowell,
E. J. Vance Bldg., Seattle, Washington.

Bell & Sanders, Warren A. Taylor, Attorneys
for Cash Cole and Bayview Realty, Inc., 324½
3rd Avenue, Fairbanks, Alaska.

J. Hellenthal, attorney for defendants, P. O.
Box 941, Anchorage Alaska.

Stephen J. Morrissey, attorney for defendants,
J. J. Vance Bldg., Seattle, Washington.

Notice Is Hereby Given that default has been made in the payment of the installment of \$10,000.00 due on or before December 31, 1953, to Nelse Mortensen, Cliff Mortensen, and Frank Henderson under the terms and provisions of the agreement contained in the stipulation filed in the above cause on October 9, 1953, and approved and embodied in the final decree entered in said cause on October 10, 1953. You are hereby further notified that Cash Cole, Everett Nowell, and/or Bayview Realty, Inc., have made further default under the terms of said agreement by failing and refusing to place in escrow all of the capital stock of Fairview Development, Inc. (except 100 share of preferred stock), consisting of 450 shares purchased by said persons under the terms of said agreement and 450 shares of said capital stock theretofore owned by said Bayview Realty, Inc., Everett Nowell, and/or Cash Cole.

Now Therefore, pursuant to the terms of said agreement and by reason of said defaults, said Nelse Mortensen, Cliff Mortensen and Frank Henderson have heretofore and do hereby declare the

full balance of the obligation provided under paragraph 2 thereof, to wit: \$89,000.00, now immediately due and owing, and do hereby require and demand the holder or holders of said capital stock, consisting of 900 shares of common stock of said Fairview Development, Inc., to be delivered to them or any one of them without further notice as their property, in full satisfaction of said balance now due and owing.

Dated this 9th day of February, 1954.

/s/ NELSE MORTENSEN,

/s/ CLIFF MORTENSEN,

/s/ FRANK V. HENDERSON.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

MOTION TO SHOW CAUSE

Now Come the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, by their attorneys, and move that the court enter an order herein directing the defendants Cash Cole and Bayview Realty, Inc., and each of them, to show cause why they should not be held in contempt of court for failure to comply with the terms and provisions of the final decree entered in this cause on October 10, 1953, and settlement agreement evidenced by the stipulation filed herein on October 9, 1953, and incorporated in said final decree, and failure to deliver the capital stock of Fairview Development, Inc., owned by them, or one of them, as provided in

said decree and stipulation; or in the alternative that an order be entered herein directing said Cash Cole and Bayview Realty, Inc., and each of them, to assign and deliver the certificates evidencing said capital stock of Fairview Development, Inc., owned by them, or either of them, to said plaintiffs Nelse Mortensen, Cliff Mortensen and Frank V. Henderson without delay, conveying thereby all their right, title, and interest in and to said capital stock in payment and satisfaction of the obligation, which said defendants agreed to secure in said stipulation by delivery of said capital stock.

In support of said motion reference is hereby made by said plaintiffs to the settlement agreement embodied in the stipulation filed in this cause on October 9, 1953, the final decree of this court approving said settlement and directing its execution entered herein on October 10, 1953, affidavits filed by plaintiffs in opposition to motion of said Cash Cole and Bayview Realty, Inc., to set aside said stipulation and vacate said final decree, and the pleadings heretofore filed in this cause and the proceedings heretofore had therein.

Dated at Fairbanks, Alaska, this 12th day of February, 1954.

JOE DIAMOND, and
EARLE ZINN, COLLINS AND
CLASBY.

By /s/ WALTER SCZUDLO,
Of Counsel for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 13, 1954.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 3532

FAIRVIEW DEVELOPMENT, INC., a Corpora-
tion,

Plaintiff,

vs.

NELSE MORTENSEN-ALASKA, INC., a Corpo-
ration; NELSE MORTENSEN and ALMA
MORTENSEN, His Wife; CLIFF N. MOR-
TENSEN and DOROTHY MORTENSEN,
His Wife; FRANK V. HENDERSON and
MABEL R. HENDERSON, His Wife, Indi-
vidually and as Co-Partners, d/b/a NELSE
MORTENSEN-ALASKA CO., and as Trustees
of NELSE MORTENSEN-ALASKA, INC., a
Corporation,

Defendants.

COMPLAINT

Plaintiff for its first cause of action alleges:

I.

That Fairview Development, Inc., is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, with its principal place of business in Fairbanks, Alaska. That the said corporation is the owner of a leasehold of real property in the Territory of Alaska, which leasehold is improved by an apartment building. That

the plaintiff corporation is not engaged in business in the State of Washington.

II.

That Nelse Mortensen-Alaska, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in Seattle, King County, Washington. That the plaintiff alleges on information and belief that Nelse Mortensen-Alaska, Inc., a corporation, was dissolved by the individual defendants herein; that the individual defendants herein were all the directors and shareholders thereof; that possession and control of all of the assets of the corporation was taken by the said individual defendants; that all of the liabilities of the corporation were assumed by them; that the individual defendants hold the assets of the corporation as trustees for the corporation and that as trustees they are obligated for the liabilities of the corporation.

III.

That the defendants, Nelse Mortensen and Alma Mortensen, are now and at all times herein mentioned have been husband and wife, residing in King County, Washington, and as such constitute a marital community; that all of the acts of Nelse Mortensen hereinafter mentioned were done and performed for the use and benefit of himself individually and of the marital community composed of Nelse Mortensen and Alma Mortensen, his wife.

IV.

That the defendants, Cliff N. Mortensen and Dorothy Mortensen, are now and at all times herein mentioned have been husband and wife, residing in King County, Washington, and as such constitute a marital community; that all of the acts of Cliff N. Mortensen hereinafter mentioned were done and performed for the use and benefit of himself individually and of the marital community composed of Cliff N. Mortensen and Dorothy Mortensen, his wife.

V.

That the defendants Frank V. Henderson and Mabel R. Henderson are now and at all times herein mentioned have been husband and wife, residing in King County, Washington, and as such constitute a marital community; that all of the acts of Frank V. Henderson hereinafter mentioned were done and performed for the use and benefit of himself individually and of the marital community composed of Frank V. Henderson and Mabel Henderson, his wife.

VI.

That the individual defendants, Nelse Mortensen, Cliff N. Mortensen, and Frank V. Mortensen, individually and as agents of their respective marital communities are co-partners d/b/a Nelse Mortensen-Alaska Co.

VII.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, defendant Nelse Mortensen-Alaska, Inc., is

a corporation organized and existing under and by virtue of the laws of the State of Washington, all of the individual defendants are citizens of the State of Washington. The matter in controversy exceeds, exclusive of interest and costs, the sum of Thirty Thousand (\$30,000.00) Dollars.

VIII.

That the plaintiff corporation possessed and now possesses a lease from the City of Fairbanks, Territory of Alaska, real property described as follows:

Commencing at Corner No. 2 of U. S. Survey No. 438 Fairbanks Townsite; thence proceeding S $0^{\circ} 01'$ West a distance of 219.22' to the point of beginning and corner No. 1 of this description; thence, S $89^{\circ} 59'$ East 990.00 feet; thence, on a curve to the left of 10.00 feet radius an arc distance of 15.71 feet; thence, N. $0^{\circ} 01'$ East, 90.00 feet; thence on a curve to the right of 1440 feet radius an arc distance of 490.00 feet; thence on a curve to the left of 13.10 feet radius an arc distance of 17.08 feet; thence N. $55^{\circ} 12'$ West 396.68 feet; thence on a curve to the left of 10.00 feet radius an arc distance of 15.71 feet; thence, S. $34^{\circ} 48'$ West 385.92 feet; thence on a curve to the right of 501.67 feet radius an arc distance of 483.47 feet; thence N. $89^{\circ} 59'$ West 305.80 feet; thence S. $0^{\circ} 01'$ West 287.10 feet; thence S. $89^{\circ} 59'$ East, 200.00 feet to corner No. 1 and point of beginning.

IX.

That on or about July 10, 1950, plaintiff as owner entered into a written construction contract with the defendant Nelse Mortensen-Alaska, Inc., for the construction of a multiple housing or apartment building on the above-described property, said building to be known as Fairview Manor Apartments, for an agreed price of Three Million Eighty Thousand (\$3,080,000.00) Dollars, a copy of which contract is attached hereto marked Exhibit A and by this reference made part hereof.

X.

That after the execution of the contract above referred to and at a time unknown to the plaintiff the individual defendants dissolved Nelse Mortensen-Alaska, Inc., and the individual defendants Nelse Mortensen, Cliff N. Mortensen, and Frank V. Henderson purporting to act as Trustees of the said Nelse Mortensen-Alaska, Inc., and as co-partners doing business as Nelse Mortensen-Alaska Co., undertook to perform the obligations of the contract, assumed all the liabilities of the contract, performed certain work in the construction of the building to be constructed pursuant to the terms of the contract and obtained all of Three Million Eighty Thousand (\$3,080,000.00) Dollars from the plaintiff.

XI.

That by the terms and provisions of the said contract, the Contractors, Nelse Mortensen-Alaska, Inc., undertook to provide the owner with the

assurance of the completion of the contract in the form of an indemnity agreement in the amount of Two Hundred Ninety-Five Thousand Nine Hundred Twenty (\$295,920.00) Dollars and the payment of the following items in connection with the project:

(a) Interest on the mortgage loan during construction;

(b) Insurance required during construction;

(c) F. H. A. mortgagees insurance premiums;

(d) F. H. A. examination fee;

(e) F. H. A. inspection fee;

(f) Financing expense;

(g) Title and recording expense, and Nelse Mortensen-Alaska, Inc., further agreed in the event the owner paid any or part of the above items (a) to (g), inclusive, the owner would receive a corresponding credit on the contract price.

XII.

That the plaintiff paid to the defendants the entire sum of Three Million Eighty Thousand (\$3,080,000.00 Dollars for the construction of said housing project.

XIII.

That the defendants refused and neglected to pay during the construction work on said housing project, although required so to do by the contract herein referred to, the following items, to wit: Interest on mortgage due January 1, 1952, Nine Thou-

sand Seventy-Five and 26/100 (\$9,075.26) Dollars and thirty days delinquent interest in the amount of Thirty and 25/100 (Dollars); interest on Mortgage due February 1, 1952, Nine Thousand One Hundred Ninety-Four and 76/100 (\$9,194.76) Dollars. Real estate taxes levied August 1, 1951, Thirty-One Thousand Six Hundred Twelve (\$31,612.00) Dollars; that due to the neglect, failure and refusal of the defendants to pay said items, plaintiffs herein made the payments. That repeated demands have been made on defendants to reimburse plaintiffs for said payments but defendants have refused and neglected to so reimburse plaintiffs contrary to the term of the contract herein referred to.

XIV.

That the defendants in their respective capacities have failed and neglected to complete the construction of the Fairview Manor Apartment project, or housing project according to the terms and provisions of the contract. The said defendants have failed among other items to comply with the terms and provisions of the contract in the following respects:

1. The floor elevations vary as follows: Building No. 1 is nine (9) inches lower than the plans call for.

Building No. 2 is one foot two and one-half inches (1' 2½") lower than the plans call for.

Building No. 3 is three and one-half inches lower than the plans call for.

Building No. 4 is seven (7") inches lower than the plans call for.

2. Ground floor level varies in each building from $3\frac{1}{2}$ to $4\frac{1}{2}$ inches.

3. Front sidewalk on the "New C. A. A. Road" is built below the highway at an elevation from $12\frac{1}{2}$ inches at the east end of Building No. Two to 23 inches at the west end of Building No. One.

4. Plans and specifications require one thousand four hundred fifty (1,450) feet of tree planting or hedges; two planting areas one 6 x 30 feet and the other 6 x 15 feet with concrete curbs, topsoil and shrubbery; eight thousand (8,000) square feet of sidewalk and cross walk; twelve (12) inches of gravel required under curbs, all of which was omitted.

5. Closets of Apartment E were eliminated and space placed in the hallway.

6. One thousand fifty-six (1,056) lineal feet of hand rail on side of all stairways; self-closing apartment entrance doors on all apartments, were not provided.

7. Six (6) inch concrete base in all garages were not furnished.

8. Four thousand (4,000) square feet of colotyle on the various bathrooms in the apartments was not provided.

9. Six by six wood bumpers in all garages were not supplied.

10. Plans required wardrobe sliding door frames and casings to be oak. Defendants supplied pine or fir.

11. Plans require six by six feet WF 15 .5# steel I beam over stairs and end bedroom. 4" x 12 timber was substituted.

12. Electric dryers in laundry rooms were vented into garages instead of through the walls.

13. Aluminum roofing on all buildings not grounded at all. Plans require each building to be grounded in three places.

14. Closets required to have six spruce or hemlock shelves, only four provided per closet.

15. Lettering on the doors as provided in the plans and specifications was omitted.

16. The proper hardware on fire doors in the basement was not provided.

17. Door closures of the rotary piston or ratchet and pinion type, on the doors of the apartment, three hundred ninety-two (392) in number, were omitted.

18. Rail brackets, card plates, numerals, letters, hooks, and fire extinguishers as provided in the plans and specifications of the contract were omitted.

19. Plans require two water wells, only one was provided.

20. Play yards and equipment as required were omitted.

21. Grading and drainage in compliance with the plans and specifications so that the water will drain away from the building was ignored.

22. Surface water pockets without any drainage contrary to the plans and specifications are numerous.

23. Plans and specifications require the siding to be three-eighths inch waterproof plywood, with shiplap joints and all joints bedded in thick lead and oil paint, that the siding should be attached with hot dip galvanized nails, all of which was not followed.

24. No electrical outlets are provided in the public hallways as required by the plans and specifications.

25. The surrounding grounds were not provided with grass and prepared by removing stones.

26. Over the top of the fire doors in the basements, several heating and electrical pipes on the ceiling pass through the wall; the void between these various pipes was not filled, making a fire hazard of the worst type.

27. Buildings No. 1 and No. 2 are 15' 5" too close to the road.

28. Plans and specifications require 8 feet parking strips outside of sidewalk with trees planted each 50 feet, none of which was supplied.

29. Plans and specifications required six inch curb and gutter along the entire street front, one thousand seven hundred ten (1,710) lineal feet of this was not supplied. One thousand seven hundred (1,700) feet of said curbs and gutters were not provided on the rear street.

30. In each building, no trenches in the floating slabs were provided as shown on the drawings to accommodate sewage outflow, therefore to accomplish the outflow essential, the reinforcement steel in the slab was cut and the concrete in the trenches was then provided after the slab had been poured, layed and set and the reinforcement steel was not placed properly, thereby resulting and producing great settlement of the building slab foundation and producing warping and uneven settlement of all the buildings.

That many of other failures, neglect, poor workmanship on the part of the defendants have occurred which are presently unknown to these plaintiffs. That as a result thereof and of the above-enumerated deficiencies the said building has been depreciated from the value as expected by the plans, specifications and contracts and by reason of the foregoing facts, plaintiff has been damaged in the sum of Five Hundred Fifty Thousand (\$550,000.00) Dollars.

XV.

Because of the wrongful refusal of the defendants to complete their said contracts according to the plans and specifications, it became necessary for the

plaintiff to complete and cause certain work to be completed. In completing the work the plaintiff expended the sum of One Hundred Thousand (\$100,000.00) Dollars which was the reasonable value of completing the work that the defendants failed to do although agreeing to do.

Wherefore plaintiff demands judgment against the defendants and each of them for the sum of Six Hundred Ninety-Nine Thousand Nine Hundred Twelve and 27/100 (\$699,912.27) Dollars with interest and that plaintiff have and recover their costs and disbursements herein.

MORRISSEY, HEDRICK,
ROBERTS & DUNHAM,
JOHN E. HEDRICK,
Attorneys for Plaintiff.

EXHIBIT A

FHA Form No. 2442-W
(Section 608)
(Revised May, 1946)

Construction Contract—"Lump Sum"

This Agreement made the 10th day of July, 1950, by and between Nelse Mortensen-Alaska, Inc. (hereinafter called the "Contractor"), and Fairview Development, Inc. (hereinafter called the "Owner").

Exhibit A—(Continued)

Witnesseth, that the Contractor and the Owner for the consideration hereinafter named agree as follows:

Article 1—Scope of Work

The Contractor shall furnish all of the materials and perform all of the work within the property lines, shown on the Drawings numbered 1 to 14, M-1 to M-4, E-1 to E-4, P-1 to P-4 and in the Specifications, the pages of which are numbered 1 to 72, which said specifications include the "General Conditions of the Contract" consisting of Articles one to 10 of the Standard form, current edition, of the "American Institute of Architects" (except as specifically modified in said Specifications) and any Supplemental General Conditions attached thereto. If anything in the said "General Conditions of the Contract" is inconsistent with this instrument, this instrument shall govern.

The said documents have been prepared by G. C. Field therein and hereinafter called the Architect.

A master set of said Drawings and Specifications entitled "Drawings and Specifications of Fairview Manor FHA Project No. 130-42013, a Rental Housing Project," identified by the Federal Housing Commissioner (hereinafter referred to as the "Commissioner") and by other parties, shall be placed on file with the Commissioner and when so filed shall govern (except as herein modified) in all matters which may arise with respect to such Drawings and

Exhibit A—(Continued)

Specifications and General Conditions, and the provisions thereof.

Article 2—Time of Completion

The work to be performed under this Contract shall be commenced within 30 days from date of this Agreement, and shall be completed to the satisfaction of the Architect and the Owner within 16 months from the beginning. In no event, however, shall the work to be performed under this Contract be considered to be completed until all construction items called for in the Drawings and Specifications have been fully completed and the contract price paid in full. It is expressly agreed, however, that in no event shall the Contractor or the Surety be liable for any damage resulting from, or, for the construction or repair of, any work damaged or destroyed by any act of God or the public enemy or mobs or riots or civil commotion; and that the Contractor and the Surety shall not be liable for any cessation of work or delay in performance of work caused by direct order of the United States Government or any of its Agencies. Any extension of time authorized or approved by FHA shall extend the completion date hereof.

Article 3—The Contract Sum

The Owner shall pay the Contractor for the performance of the Contract, subject to additions and

Exhibit A—(Continued)

deductions provided herein on account of construction the sum of \$3,080,000.

All requests for changes in the Drawings and Specifications must be in writing signed by the Owner and the Lender and shall be conditioned upon the approval of the Commissioner, which approval may be subject to such conditions and qualifications as the Commissioner in his discretion may prescribe, it being understood that the Commissioner at all times has the right to require compliance with the original Drawings and Specifications.

The Contractor shall assume full responsibility for the maintenance of such landscaping as may be required by the Drawings and Specifications until such time as both parties to this Contract shall receive notice in writing from the Commissioner that the work has been satisfactorily completed. The Owner hereby agrees to make available to the Contractor, without cost to the latter, such facilities as water, hose, and sprinkler.

Article 4—Schedule of Payments

Applications for payments under this Contract are to be made by the Contractor to the Owner, approved by the architect, in quadruplicate on FHA Form No. 2448-W, on or about the first day of each month after the commencement of work hereunder, for payment for work done during the preceding month or part thereof. The sum to which the Contractor shall be entitled upon any such payment

Exhibit A—(Continued)

shall be the total of the purchase price of uninstalled materials stored on the mortgaged property in a manner acceptable to the Commissioner plus the cost of the portions of the work acceptably completed, as approved by the Commissioner, computed in accordance with the amounts assigned to the several items in the Payment Breakdown, hereto annexed marked Exhibit A, less 10% and less prior advances. Applications shall be filed by the Contractor at least 10 days before the date upon which payment is desired. The Contractor shall only be entitled to payment in the amount approved by the Lender and the Federal Housing Commissioner with respect to said application.

If the Total of the Payment Breakdown Items in the Payment Breakdown exceeds the total cash contract price, then the cash sum payable to the Contractor upon any payment as estimated from the Payment Breakdown Items shall be reduced in the same proportion as the total of such Payment Breakdown Items exceeds such total cash contract price. If the Total of the Payment Breakdown Items in the Payment Breakdown are less than the total cash contract price, then the cash sum payable to the Contractor upon any payment as estimated from the Payment Breakdown Items shall be increased in the same proportion as such total cash contract price exceeds such Total of the Payment Breakdown Items.

Upon completion of the improvements, including

Exhibit A—(Continued)

all landscape requirements, the balance due the Contractor hereunder shall be payable to the Contractor upon the expiration of 30 days from the date of final completion and acceptance of the project by the Owner with the approval of the Commissioner and the Lender: Provided, however, That this contract shall not be considered complete for purposes of final payment unless and until, all the work requiring inspection by municipal or other governmental authorities having jurisdiction, have been duly inspected, and approved by such authorities and by the applicable Board of Fire Underwriters, if any, and all requisite certificates of occupancy and other approvals have been duly issued: And provided further, That the Owner or Lender may withhold approval of final payment until after the expiration of any period which laborers, subcontractors, and materialmen may have for filing notice of Mechanics' Liens, and until after satisfactory completion of all off-site utilities and streets as required by the Lender and Federal Housing Commissioner.

Article 5—Cessation of Work

The Contractor understands that the work herein provided to be done is to be financed by a building loan secured by a mortgage to be insured by the Federal Housing Commissioner, the terms of which are set forth in a Building Loan Agreement between the Owner as Borrower, and The National Bank of Commerce of Seattle as Lender. The Con-

Exhibit A—(Continued)

tractor, in the event of the failure of the Owner to perform its obligations to the Lender under said Building Loan Agreement, shall, upon receipt of written notice from the Lender that it has elected not to proceed with the work, immediately cease performance of this Construction Contract and all its obligations thereunder, and this Contract shall terminate upon receipt by the said Contractor of said notice.

In such event, provided the Contractor is not in default under this Construction Contract, the Contractor may within fifteen (15) days after receipt of such notice submit directly to the Lender an application for advances to pay claims for work done and materials furnished up to the time such written notice was received by the Contractor as aforesaid, and the Contractor shall be entitled to receive such amount as may be approved by the Federal Housing Commissioner and the Lender to be paid to the Contractor as and for the value of such work and materials.

Article 6—The Contract Documents

The Drawings and Specifications, including the General Conditions and Supplemental General Conditions, together with this Agreement and Exhibits hereto attached, form the Contract and all of said documents are as fully a part of the contract as if hereto attached or herein repeated.

Exhibit A—(Continued)

Article 7

Anything to the contrary notwithstanding, it is agreed by and between the parties hereto that whenever any statements, documents, or data of any sort, nature, or description are required under this Contract to be submitted to the Architect or Owner, or both, duplicates of such statements, documents, or data shall be likewise submitted to the Commissioner and Lender, if requested by them or either of them or to their duly-constituted representatives. It is further agreed by and between the parties hereto, that whenever it is provided in this Contract that the approval of, or the certificate or order from the Architect shall be received either as a condition precedent to any action being taken or not taken, as the case may be or as a prerequisite to the exercise by the parties hereto of any right or rights hereunder, including the right to receive payment under this Contract, the Commissioner or the Lender may require that such approval and such certificate or order shall, before being effective, be accompanied by the written approval of the Commissioner and the Lender or their duly authorized representatives.

Article 8—Waiver of Mechanics' Lien

The Contractor hereby specifically agrees that no mechanics' liens or other claim or claims shall be filed or maintained by it against the said buildings

Exhibit A—(Continued)

and improvements and real estate appurtenant thereto for or on account of any work or labor done or materials furnished under the Contract or otherwise, for, toward, in or about the erection and construction of the said buildings and improvements.

Article 9—Receipts and Releases of Lien

The Owner may require that the Contractor obtain and attach to each application for payment acknowledgments of payment down to the date covered by the last advance, from all subcontractors and materialmen dealing directly with the Contractor, and concurrently with final payment for the entire Project according to the Schedule of Payments may require that the Contractor obtain in duplicate an affidavit and releases of lien, in the form required under the lien law of the State wherein the premises are situated. Said releases of lien, if required, shall cover all work, labor, and materials including equipment and fixtures of all kinds done or performed for or furnished to the Borrower, the Contractor, subcontractors, and materialmen. The Contractor shall execute an affidavit accompanying such releases of lien.

Article 10

The Contractor agrees not to assign this Contract or any amount payable hereunder or to sublet the whole or substantially the whole of this Contract except with the prior written consent of the Owner and the Lender. The contractor also agrees upon request to disclose to the Lender the names of all

Exhibit A—(Continued)

persons with whom it has contracted or intends to contract or hereafter contracts with respect to work and materials required to be furnished hereunder. The Contractor hereby agrees that the Owner may assign this Contract or any rights arising hereunder, including any guarantees or warranties of workmanship or material, to the Lender or the Federal Housing Commissioner.

Article 11

The Contractor (1) understands that the wages to be paid laborers and mechanics employed in the construction of the Project are required by the provisions of Section 212 (a) of the National Housing Act, as amended, to be not less than the wages prevailing in the locality in which the work was performed for corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor with respect to this Project, and (2) hereby states that he has read the aforesaid determination by the Secretary of Labor and is fully familiar with the same.

The Contractor agrees as a condition precedent to the payment to him of any advance hereunder to submit to the Commissioner (1) with each application for advance prior to the final application, a certificate or certificates executed by him and in form approved by the Commissioner, certifying that all laborers and mechanics employed in the construction of the Project whose work is covered by this

Exhibit A—(Continued)

or any previous application and who have been paid in whole or in part on account of said employment, have been paid at a rate not less than the rate of wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed in construction of a similar character, as determined by the Secretary of Labor with respect to this Project, and (2) with the final application for advance, a certificate or certificates in form satisfactory to the Commissioner, certifying that the Project has been fully constructed in accordance with the provisions of this Contract and that all laborers and mechanics employed in the construction of the completed Project have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor with respect to this Project.

Article 12

Notwithstanding any other provision of this Agreement, or the Specifications which form a part hereof, the Contractor shall furnish at its own expense all building and other permits, licenses, tools, equipment, temporary structures, and water necessary for the construction of the Project as required.

The Contractor shall also furnish to the Owner and the Lender, with duplicate copy to the Commissioner, a survey showing the location on the site

Exhibit A—(Continued)

of the improvements constructed thereon. Such survey shall be supplied with the application of the Contractor for the first payment on each unit or building, not theretofore located on said survey, and with the application of the Contractor for final payment on the completed Project. The survey accompanying the request for final payment must show the exact location of all water, sewer, gas, and electric mains, and of all easements for such utilities then existing. Such surveys shall be prepared by a licensed surveyor who shall certify that the Project is installed and erected entirely upon the land covered by the Mortgage and within the building restriction lines, if any, on said land, and does not overhang or encroach upon any easement or right-of-way of others.

Article 13—Assurance of Completion

The Contractor agrees to furnish the Owner with assurance of completion in the form of indemnity agreement in the amount of \$295,920.00, and payment of the following items in connection with the project:

- (a) Interest on the mortgage loan during construction;
- (b) Insurance required during construction;
- (c) FHA mortgage insurance premiums;
- (d) FHA examination fee;
- (e) FHA inspection fee;
- (f) Financing expense;
- (g) Title and recording expense.

Exhibit A—(Continued)

In the event the owner has paid any or part of the above items (a) through (g), inclusive, then the owner shall receive a corresponding credit on the contract price.

Article XIV.

Notwithstanding any other provision herein with reference to payment, payments on this contract are to be made by the owner turning over to the contractor all monies and advances received by or made available to owner from the lending institution under the insured mortgage covering this project.

FAIRVIEW DEVELOPMENT,
INC.

By /s/ EVERETT NOWELL,
President.

By CASH COLE,
Secretary.

NELSE MORTENSEN-
ALASKA, INC.,

By CLIFF N. MORTENSEN,
President.

By NELSE MORTENSEN,
Secretary.

[Endorsed]: Filed July 23, 1953.

[Endorsed]: Filed April 3, 1954.

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 3532

FAIRVIEW DEVELOPMENT, INC., a Corpora-
tion,

Plaintiff,

vs.

NELSE MORTENSEN-ALASKA, INC., a Corpo-
ration,

Defendants.

STIPULATION AND ORDER OF DISMISSAL

It Is Hereby Stipulated by and between the plaintiff, Fairview Development, Inc., by and through its attorneys of record, and the defendants, Nelse Mortensen-Alaska, Inc., a corporation; Nelse Mortensen and Alma Mortensen, his wife; Cliff N. Mortensen and Dorothy Mortensen, his wife; Frank V. Henderson and Mabel R. Henderson, his wife, individually and as co-partners, d/b/a Nelse Mortensen-Alaska Co., and as Trustees of Nelse Mortensen-Alaska, Inc., a corporation, by and through their attorneys of record, that the above-entitled action has been fully settled and compromised, and that the same should be dismissed with prejudice and without costs.

LYCETTE, DIAMOND &
SYLVESTER,

Attorneys for Defendants.

By /s/ JOSEF DIAMOND.

MORRISSEY, HEDRICK,
ROBERTS & DUNHAM,
Attorneys for Plaintiff.

By /s/ JOHN E. HEDRICK.

ORDER

Based upon the foregoing Stipulation,

It Is Hereby Ordered, Adjudged and Decreed
that the above-entitled action be, and the same is
hereby, dismissed with prejudice and without costs.

JOHN C. BOWEN,
Judge.

Approved:

MORRISSEY, HEDRICK,
ROBERTS & DUNHAM.

By JOHN E. HEDRICK,
Attorneys for Plaintiff.

Presented and Approved by:

LYCETTE, DIAMOND, &
SYLVESTER,

By JOSEF DIAMOND,
Attorneys for Defendants
R. E. Callahan.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division, Oct. 28, 1953.

MILLARD P. THOMAS,
Clerk.

[Endorsed]: Filed April 3, 1954.

[Title of District Court and Cause.]

No. 7298

MOTION TO STRIKE NOTICE OF APPEAL

Now Come the plaintiffs, Fairview Development, Inc., an Alaska Corporation; Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., by their attorneys, Collins and Clasby, and move that the notice of appeal filed in the above-entitled cause on or about May 10, 1954, from the final judgment and decree entered in said cause, and from the order entered May 7, 1954, overruling defendants' motion to set aside and rescind the stipulation upon which said judgment was based and said final judgment and decree, be stricken as to Fairview Development, Inc., plaintiff in the above-entitled cause, because said plaintiff has at all times been represented in this cause by Collins and Clasby and Josef Diamond and Earle Zinn of Lycette, Diamond & Sylvester, and not by Bailey E. Bell and William Sanders and Warren A. Taylor, and the latter have no authority to file a notice of appeal on behalf of said plaintiff, Fairview Development, Inc., an Alaska Corporation, which corporation had joined in and secured the execution and filing of said stipulation on October 9, 1953, the entry of said final judgment and decree on October 10, 1953, and the entry of the order on May 7, 1954, overruling de-

endants' motion to set aside or rescind said stipulation and vacate said final judgment and decree from which said notice of appeal is purportedly taken.

Dated at Fairbanks, Alaska, this 10th day of May, 1954.

COLLINS AND CLASBY.

By /s/ WALTER SCZUDLO.

Affidavit of Mailing attached.

Receipt of Copy acknowledged.

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

RECEIVER'S PETITION NUMBER ONE

Your petitioner, Robert E. Sheldon, respectfully represents to the court as follows:

1. That he was appointed receiver on May 7, 1954, for the property involved in the above-entitled cause, all the assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; that a

receiver's bond in the sum of \$50,000.00 was heretofore filed and approved by order of this court on May 10, 1954; and that he is in all respects the duly qualified and acting receiver herein.

2. That the principal property of the plaintiff corporation involved in the above-entitled cause is the Fairview Manor Apartments, being a 272-unit apartment project located in the Weeks Field Subdivision on Airport Road, Fairbanks, Alaska, consisting of four buildings.

3. That said Fairview Manor Apartments are subject to an FHA insured mortgage in the original principal sum of \$3,080,000.00, obtained for the purpose of financing the construction of said project; that this petitioner is informed and believes and upon such information and belief states the fact to be that the present owner and holder of said mortgage and the indebtedness secured thereby is Institutional Securities Corporation, a corporation; that the servicing agent for said mortgagee is Seattle Trust and Savings Bank, a banking corporation, with its principal place of business at Seattle, Washington; that under said mortgage there is due on the first of each and every month a total payment of \$21,690.16.

4. That at the time this petitioner was appointed receiver, and took possession of the checking accounts of the plaintiff corporation, Fairview Development, Inc., at the bank of Fairbanks and the First National Bank of Fairbanks, there was \$15,249.06 in the former and \$141.00 in the latter, which

sums were transferred to the checking account opened at the First National Bank of Fairbanks pursuant to directions of this court and its order, in the First National Bank of Fairbanks; that collection of rents and income from Fairview Manor Apartments has been made by your petitioner since his appointment and deposited in said receiver's account at the First National Bank of Fairbanks; that said collections, plus the cash found in the bank deposits hereinabove mentioned, were paid out on May 18, 1954, in payment of the following delinquent February and March bills, which were presented to the receiver for payment:

Alaska Communications System.....	\$ 5.58
Fairbanks garbage disposal.....	151.50
Potter's Store (paint and hardware supplies)	84.74
Sourdough Express (hauling coal).....	240.59
Municipal Utilities System (telephone)...	242.87
Municipal Utilities System (electricity) ..	1,341.54
Union Oil Company (gasoline and oil)....	111.78
Fairbanks Lumber (lumber for repairs) ..	72.40
G. R. Sumpter Agency (workmen's compensation insurance)	153.88
Seattle Hardware Company (supplies)....	120.12
Northern Commercial Company (repairs for stoker)	84.20
Vacuum Sales and Service (supplies—April voucher)	29.08
<hr/>	
Total	\$2,638.28

In addition, all wages have been paid to employees and are current covering firemen, maintenance men, janitors and cleaning women. There are five less employees employed by this petitioner than were formerly employed at said project (including the discharge of Cash Cole, Mrs. Ruth Cole and Tom Cole from the payroll). The total wages paid, net: \$2,220.38.

5. That in addition to the payments hereinbefore mentioned, the receiver paid \$16,690.16 on account of the mortgage installment due on May 1, 1954, leaving a balance due under said installment of \$5,000.00; that said installment is now delinquent as to the balance due thereunder and will be in default if payment thereof is not made on or before the end of this month.

6. That the cash on hand of the plaintiff corporation, Fairview Development, Inc., in its account at Bank of Fairbanks, was reduced on or about May 8, 1954, after the appointment of this petitioner as receiver, by payment to said bank from said account of \$7,648.36, which this petitioner has been informed was in payment of a note executed by said Fairview Development, Inc., to evidence sums borrowed from said bank earlier this year; that in addition there was a payment of \$1,325.86 to the Director of Internal Revenue from said account, and likewise other substantial payments were drawn against said account and paid therefrom between April 30, 1954, the date on which the court rendered its opinion in the above-entitled cause granting the motion for appointment of receiver and ruling on other mo-

tions, and the date on which this receiver was appointed; that as of the date hereof the receiver has cash on hand in his checking account in the sum of \$4,776.72; that wages to the employees will be due at the end of this week in the net sum of approximately \$1,500.00.

7. That there is insufficient cash on hand to pay said balance of \$5,000.00 due on said mortgage installment of May 1, 1954, hereinabove mentioned; that said payment of said balance should be made prior to the end of this month; that it will be necessary to borrow a sum not in excess of \$5,000.00 to make said payment prior to the end of this month; that it may be necessary in the future to borrow sums sufficient to insure the full payment of said monthly mortgage installment for periods not to exceed 30 days, until all of the delinquent and unpaid bills and other obligations of the plaintiff corporation have been placed on a current basis, which your petitioner believes can be accomplished in the next 60 or 90 days.

8. That the First National Bank of Fairbanks, Fairbanks, Alaska, a national banking association, has indicated to your petitioner that it will agree to loan sufficient sums to make payments of installments due under the first mortgage, for periods not to exceed 30 days, such loans to be repaid out of current rents and collections, and such indebtedness of the receiver to be evidenced by a receiver's certificate in the amount or amounts of such loan or loans from time to time, which said receiver's

certificate or certificates shall run for periods not to exceed 30 days with interest at 8% per annum, and shall be a first, prior and paramount lien upon the rents, income and collections made by this receiver, prior, superior and paramount to the right, title, interest and lien of any of the parties to this suit. A copy of the proposed receiver's certificate is hereto attached as Exhibit "A" and made a part hereof.

9. That notice of this petition has not been given by the undersigned to the parties of record due to the insufficient time available prior to the end of this month but that copies of this petition and of any order entered by this court will be served on all parties of record.

Wherefore, your petitioner prays that an order be entered in this cause, authorizing him, as receiver, to borrow a sum not to exceed \$5,000.00 for a period not to exceed 30 days, to pay the balance due under said mortgage installment due May 1, 1954, and to secure the amount necessary to cover said payment so expended by issuing and selling a receiver's certificate in an amount not to exceed \$5,000.00 and in the form, terms and figures set out in Exhibit "A" to this petition; and further authorizing your petitioner hereafter to borrow such additional sum or sums from time to time for payment of any balances due on installments, which may become delinquent under said mortgage, for periods not to exceed 30 days, to be paid out of the rents, collections, and income secured by your petitioner as receiver, and

to be secured by issuance of this receiver's certificate or certificates for the amount or amounts so borrowed from time to time, and in the sum to be set out in said Exhibit "A" to this petition.

/s/ ROBERT E. SHELDON.

EXHIBIT A

Receiver's Certificate of Indebtedness

Date:

Amount:

No.....

The undersigned, Robert E. Sheldon, receiver of Fairview Manor Apartments, located on Airport Road, Fairbanks, Alaska, and all the assets of Fairview Development, Inc., an Alaska corporation, and its business, real property, and all other property, and the rents, issues and profits thereof, appointed by order of the District Court for the District of Alaska, Fourth Judicial Division, on May 7, 1954, and now the duly qualified and acting receiver in case No. 7298, entitled: Fairview Development, Inc., et al., vs. Cash Cole, et al., not individually, but as such receiver, promises to pay to First National Bank of Fairbanks, Fairbanks, Alaska, the sum of..... (\$.....), on or before.....days after the date hereof, with interest at the rate of 8% per annum, both interest and principal, being payable at the banking house of said payee, Fairbanks, Alaska.

This certificate is issued under and by virtue of

the authority granted the undersigned as receiver by order of the District Court for the District of Alaska, Fourth Division, entered on the..... day of....., 1954, in said cause, No. 7298. This certificate is, by virtue of the terms of said order, a first, prior, and paramount lien on the rents, issues and profits of Fairview Manor Apartments and all other collections and receipts secured by the undersigned in said case as receiver as aforesaid and said lien is prior, superior and paramount to the right, title and interest and lien of all of the parties of interest in this cause and is prior, superior and paramount to the right, title, interest, lien and claims of all persons having or claiming to have any right, title, interest, lien or claim in and to said premises involved in the above mentioned cause or any part or portion thereof.

The holder or holders of this certificate shall be entitled to reasonable attorney's fees in the event said holder or holders hereof shall be required to institute proceedings to collect under this certificate or to foreclose the lien thereof, or shall be made a party to any proceedings involving the above mentioned premises, which fees and expenses shall be so much additional indebtedness, evidenced hereby, and shall be a lien on the rents, issues and profits of said premises and collections made by the undersigned as receiver.

In Witness Whereof, said Robert E. Sheldon, not individually, but as such receiver has hereunto

set his hand and seal this.....day of
, A.D. 1954.

.....
 Robert E. Sheldon, Not Individually, but as Re-
 ceiver Aforesaid.

[Endorsed]: Filed May 27, 1954.

In the District Court for the District of Alaska,
 Fourth Division

No. 7298

FAIRVIEW DEVELOPMENT, INC., et al.,
 Plaintiffs,

vs.

CASH COLE, et al.,
 Defendants.

ORDER ON RECEIVER'S PETITION No. 1

This matter coming on to be heard upon petition No. 1 of Robert E. Sheldon, as receiver; and it appearing and the court finding that heretofore on May 7, 1954, this court entered an order, which, among other things, appointed Robert E. Sheldon of the City of Fairbanks, as receiver for the property involved in the above-entitled cause, and all the assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon, and the fixtures, equipment merchandise, stock and personal property located therein, and

Fairview Manor Apartments, and the rents, issues, and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; and it appears and the court finds that said receiver on the same day filed his written oath herein and accepted said appointment, and heretofore filed herein a receiver's bond in the penal sum of fifty thousand dollars (\$50,000.00) as security, which was heretofore approved by this court, and was conditioned upon the faithful performance of his duties as such receiver, all in accordance with the terms and provisions of said order, and said Robert E. Sheldon is now the acting and duly qualified receiver in this cause; that it appears necessary for the receiver to borrow at this time funds to pay the balance due under the delinquent mortgage installment, which became due on May 1, 1954, under the FHA insured mortgage covering the premises involved in this cause to avoid default thereunder, and the receiver does not have sufficient funds to pay the balance due under said mortgage installment at this time; and the court being otherwise fully advised in the premises.

It is now, therefore, ordered, adjudged and decreed as follows:

1. That said receiver, Robert E. Sheldon, is hereby authorized to borrow from the First National Bank of Fairbanks, Fairbanks, Alaska, a sum not exceeding \$5,000.00 to pay the balance due under said mortgage installment which became due on May 1, 1954, under the FHA insured mortgage

covering the premises involved in the above-entitled cause and known as Fairview Manor Apartments, to be secured by a receiver's certificate of indebtedness in that amount not exceeding \$5,000.00 and payable on or before 30 days after the date thereof and to be in the form substantially as Exhibit "A" attached to said receiver's petition No. 1.

2. That said receiver is hereby further authorized to borrow such additional sums hereafter from time to time as he may deem necessary to pay any balance or balances due under subsequent installments which may become delinquent under said FHA insured mortgage for periods not to exceed 30 days and to be paid out of the rents and receipts collected by said receiver, and to be secured by receiver's certificates of indebtedness in the form substantially of exhibit "A" attached to said receiver's petition No. 1, and to be paid in not exceeding 30 days after the date of execution of such certificate or certificates.

Entered and done this 27th day of May, 1954.

/s/ HARRY E. PRATT,

United States District Judge.

[Endorsed]: Filed and entered May 27, 1954.

[Title of District Court and Cause.]

RECEIVER'S MONTHLY REPORT AND
ACCOUNT FOR MAY, 1954

The undersigned, Robert E. Sheldon, respectfully

represents and reports to the court as follows:

1. That he was appointed receiver on May 7, 1954, for the property involved in the above-entitled cause, all the assets and corporate records of the plaintiff corporation, Fairview Development, Inc., and its business, together with all improvements located thereon and the fixtures, equipment, merchandise, stock and personal property located therein, and Fairview Manor Apartments, and the rents, issues and profits thereof with all the usual rights, powers and duties of receivers in equity in like cases, until further order of this court; that a receiver's bond in the sum of \$50,000.00 was heretofore filed and approved by order of this court on May 10, 1954; and that he is in all respects the duly qualified and acting receiver herein.

2. That the principal property of the plaintiff corporation involved in the above entitled cause is the Fairview Manor Apartments, being a 272-unit apartment project located in the Weeks Field Subdivision on Airport Road, Fairbanks, Alaska, consisting of four buildings.

3. That an order was entered in the above cause providing, among other things, that this receiver make a written monthly accounting of all his receipts and disbursements for each calendar month on or before the 10th day of the month succeeding the period covered by each report, the first report to be made on or before June 10, 1954; that attached hereto marked as exhibit "A," and by this reference made a part hereof the same as if herein fully

set out, is an account of all of the receipts and disbursements secured and made by this receiver from the time of his appointment to and including May 31, 1954; and that this report and accounting is submitted to this court pursuant to said order.

4. That collection of rents and income from Fairview Manor Apartments and all other collections have been made by this receiver since his appointment and deposited by this receiver in a banking account opened in his name as receiver, with the First National Bank of Fairbanks, Alaska, that all expenditures for any purpose made by this receiver have been done only by check against said checking account, which checks have been countersigned by Ray Kohler, public accountant, all in accordance with the provisions of said order dated May 10, 1954.

5. That said Ray Kohler has maintained the books of account of said plaintiff corporation and of this receiver and prepared the attached account of receipts and disbursements; that said Ray Kohler has performed said services as a public accountant and used the facilities of his office all on a time basis; that his charges for said services are \$7.50 per hour for those performed by himself, and \$5.00 per hour for those services performed by his assistants, which charges include the use of the facilities of his office; that this receiver is informed and believes, and upon such information and belief states the

fact to be that said charges are the usual and customary charges for services of this nature in the Fairbanks area, and are fair and reasonable.

6. That at the time of the appointment of this receiver there were two bank accounts maintained for the plaintiff corporation, one at the Bank of Fairbanks and the other at the First National Bank of Fairbanks; that the balance in the sum of \$15,249.06 in the first account above mentioned and \$141.00 in the second account above mentioned, have been transferred by this receiver to his checking account.

7. That notice was served on both banks prior to the opening of business on May 8, 1954, that no checks theretofore drawn against said accounts should be honored without the approval of this receiver; that an investigation of this receiver disclosed that the following, among other checks, had been drawn by the defendant Cash Cole, or by and through his authorized agent, against said account of the plaintiff corporation at the Bank of Fairbanks:

Check No. 409.

Date of Check: April 30, 1954.

Payee: Cash Cole

Reported Purpose: Purchase of furniture in
Apartment 3-B-7.

Amount: \$862.50.

Check No. 410.

Date of Check: April 30, 1954.

Payee: W. A. Taylor.

Reported Purpose: Attorney's fees, 1954.

Amount: \$8,000.00.

Check No. 411.

Date of Check: April 30, 1954.

Payee: Bank of Fairbanks.

Reported Purpose: Payment of Note.

Amount: \$7,648.33.

Check No. 420.

Date of Check: May 6, 1954.

Payee: Warren A. Taylor.

Reported Purpose: Court costs.

Amount: \$1,500.00.

That of the above-described checks, the one bearing No. 411, payable to the Bank of Fairbanks, has been honored by said bank without the specific authority of this receiver; that the others have not been paid as far as this receiver is informed; that all other checks drawn on said account prior to May 7, 1954, and during the period between April 30, 1954, when the opinion of this court was ren-

dered, directing, among other things, the appointment of a receiver herein, and May 7, 1954, when this receiver was appointed, have been honored and paid.

8. That the monthly installment of principal, accrued interest, and other payments due under the FHA insured mortgage covering the Fairview Manor Apartments project due on May 1, 1954, in the sum of \$21,690.16 was delinquent at the time of the appointment of this receiver as more fully stated in Receiver's Petition No. 1, filed in the above-entitled cause on May 27, 1954; that it was necessary to borrow \$5,000.00 from the First National Bank of Fairbanks, pursuant to authority of this court granted in its order entered herein on May 27, 1954, on said receiver's petition; that the total installment due on May 1, 1954, has been paid in full; that a receiver's certificate of indebtedness for said loan of \$5,000.00 was executed and delivered to the First National Bank of Fairbanks in substantially the form marked as Exhibit "A" and attached to said Receiver's Petition No. 1.

9. That Mr. V. P. Reimer, director of the Federal Housing Administration at Juneau, Alaska, has requested that a complete audit report showing the current financial condition of the project be secured as soon as possible, which report should be prepared by a certified public accountant and should contain a balance sheet, current profit and loss statement, and a statement of surplus; that a similar report has been requested by the plaintiffs; that such audit is now being prepared up to ap-

proximately the date of the appointment of this receiver by the office of Pritchard & Lofquist, certified public accountants, Seattle, Washington, covering the period from the last day on which said accountants prepared their audit of the books of said plaintiff corporation up to and including the appointment of this receiver; that copies of said audit will be submitted to this court when prepared with the next report and accounting of this receiver.

10. That the employment of Mr. and Mrs. Cash Cole with the corporation and Fairview Manor Apartments was terminated as of the close of business on May 7, 1954, and settlement and payment was made of all sums due them for salaries or wages; that said Mr. and Mrs. Cash Cole are occupying a double apartment; said double apartment consisting of efficiency apartment No. 2-A-7, calling for a rental of \$125.00 per month, unfurnished, and apartment No. 2-A-8, being a two-bedroom apartment calling for a monthly rental of \$165.00 per month, unfurnished; that said apartments have been furnished by furniture and furnishings owned by the plaintiff corporation, and that this receiver is informed and believes and upon such information and belief states the fact to be that the monthly rental value of said furniture and furnishings is at least \$50.00; that said defendant, Cash Cole and his wife, have made no payment for the rental of said double apartments and furniture and furnishings and that the same is due from them from the date of the appointment of this receiver.

11. That the employment of Tom Cole was termi-

nated as of May 15, 1954, and that all sums due him for wages and salary have been settled and paid; that said Tom Cole and his wife occupy a two-bedroom apartment, being 3-E-7, for which the rental is \$165.00 per month; that no payment has been made by said Tom Cole for said rental and that the same remains due and unpaid and owing to this receiver from May 15, 1954, to the date hereof.

12. That at the time of the appointment of this receiver there were approximately 30 vacant apartments in the Fairview Manor; that these vacancies had been reduced down to 19 on May 31, 1954; that included in said 19 vacancies are 3 apartments rented by Moorland Contractors, Inc., of Portland, Oregon, and an apartment formerly reserved for the defendant, Everett Nowell; that this receiver is informed and believes and upon such information and belief states the fact to be that the defendant Cash Cole is or was an officer, director and stockholder of said Moorland Contractors, Inc.; that there is due from said Moorland Contractors, Inc., the sum of \$1,050.00 on each of said three apartments, which sum includes the rental for the month of June; that this receiver is attempting to collect said delinquent accounts from said Moorland Contractors, Inc., and to secure release of possession of said apartments.

13. That it has been necessary to sign rental lease agreements with new tenants secured by this receiver; that the terms and conditions of said rental lease agreement have been substantially the

same as those contained in agreements executed by the plaintiff corporation prior to the appointment of this receiver, except that the lease agreements signed by this receiver have been specifically made subject to the orders of this court and subject to termination by discharge of this receiver in said proceedings.

14. That this receiver has been occupied full time since his appointment in matters pertaining to said receivership and management at Fairview Manor Apartments.

Wherefore, this receiver prays as follows:

(a) That the above and foregoing report and monthly account of this receiver be approved.

(b) That the retention of the certified public accountants, Pritchard & Lofquist, to make an audit be approved, and likewise payment for said audit.

(c) That payment of charges made by Ray Kohler, public accountant, appointed by this court pursuant to order entered May 10, 1954, which charges are hereinabove set out, on a time basis be approved and the receiver permitted to make payment out of the receipts secured by him.

(d) That said defendant, Cash Cole and his wife, Ruth Cole, be directed to pay to this receiver rental in the sum of \$340.00 per month beginning May 7, 1954, for the double apartment occupied by them and the furniture and furnishings therein, in advance, and in addition, to make a deposit of one month's rent in advance as security in accordance with the general procedures followed at said

project; and that upon failure to make such payment and deposit within 15 days from the date of the order of the court, that the clerk of this court be directed to issue a writ of assistance directing the United States Marshal for the Fourth Judicial Division to remove said defendant and his wife and any person or persons occupying said apartments No. 2-A-7 and No. 2-A-8, and return possession of said apartments and the furniture and furnishings therein to this receiver.

(e) That Tom Cole be directed to pay rent in the sum of \$165.00 monthly, in advance, beginning May 15, 1954, for the apartment occupied by him No. 3-E-7, and that if he fails to make such payment on or before 15 days from the date of the order of this court that the clerk of this court be directed to issue a writ of assistance directed to the United States Marshal, Fourth Judicial Division, directing said marshal to remove said Tom Cole and his wife and all other person or persons occupying said apartment No. 3-E-7 and their property therefrom, and to return possession of said apartment to this receiver.

(f) That the execution of rental agreements by this receiver in the form and with the terms hereinabove mentioned be approved.

(g) That the court allow receiver's fees for the services of the undersigned as receiver herein.

Dated at Fairbanks, Alaska, this 10th day of June, 1954.

/s/ ROBERT E. SHELDON.

United States of America,
Territory of Alaska—ss.

Robert E. Sheldon, being first duly sworn, on oath, deposes and says: That he is the receiver in the above-entitled cause; that he has read the above and foregoing monthly receiver's report and account; knows the contents thereof and that the same are true in substance and in fact, except such matters as are alleged upon information and belief, and as to such matters he has made diligent search and inquiry and believes the same to be true.

/s/ ROBERT E. SHELDON.

Subscribed and sworn to before me this 10th day of June, 1954.

[Seal] /s/ MYRTLE L. BOWERS,
Notary Public in and for the
Territory of Alaska.

My commission expires: June 10, 1958.

EXHIBIT A

Fairview Development Co., Inc.
Fairbanks, Alaska

Robert E. Sheldon, Receiver

Statement of Source and Application of Funds
Period May 8, 1954, Through May 31, 1954

Source of Funds:

On Hand May 8, 1954—

Office Fund	\$ 168.87
Deposit in Transit	82.50
Bank of Fairbanks	15,249.06
First National Bank	144.21
Bank of Commerce	100.00

Total Funds on Hand	<u>\$15,744.64</u>
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Source of Funds—(Continued)

Income from Operations—

Apartment and Garage Rentals ..	\$11,935.21
Security and Key Deposits	1,740.70
Laundry Proceeds	145.80
Vacuum Cleaner Rentals	6.00
Cleaning Apartments	10.50
Miscellaneous	2.50

Total Funds from Operations ..	\$13,840.71
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Other Additions to Funds—

Loan, First National Bank	\$ 5,000.00
Note Payment, Victor Olson	200.00
Deposit Returned	18.00
Reimbursement of Office Fund	131.13

Total Other Additions	\$ 5,349.13
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Total Funds from All Sources	\$34,934.48
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Application of Funds:

Funds Expended—

Payments of Trade Accounts Payable	\$ 2,638.28
Wages	2,289.76
Payment to Federal National Mtg. Ass'n.	21,690.16
Refunds of Tenants' Deposits and Rentals	1,138.30
Refunds on Over-Collection of School Tax	20.00
Bank Charges—Exchange	30.68
Painting Apartments — C. W. Lloyd, Contractor	376.62
Repairs to Boilers—Paul Baker, Contractor	160.00
Reimburse Office Fund for Expenses—Paid by Cash Prior to May 8, 1954	131.13

Total Funds Expended	\$28,474.93
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Application of Funds—(Continued)

Funds on Hand May 31, 1954—

Office Fund	\$ 300.00
First National Bank	6,059.55
Bank of Commerce	100.00

Total Funds on Hand	6,459.55
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Total Funds Applied	\$34,934.48
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Certified Correct.

RAY KOHLER,

Public Accountant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1954.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 7298 Civil

FAIRVIEW DEVELOPMENT, INC., an Alaska Corporation; NELSE MORTENSEN, CLIFF MORTENSEN and FRANK V. HENDERSON, Individually and as Directors and Stockholders of Fairview Development, Inc., and for and on Behalf of All Other Stockholders of Fairview Development, Inc.,

Plaintiffs,

vs.

CASH COLE, Individually and as an Officer and Director of Bayview Realty, Inc., an Alaska Corporation, and Fairview Development, Inc.; EVERETT NOWELL, Individually and as an

Officer and Director of Bayview Realty, Inc.; and Fairview Development, Inc.; BAYVIEW REALTY, INC., an Alaska Corporation; FIRST NATIONAL BANK OF FAIRBANKS, a Corporation; and BANK OF FAIRBANKS, a Corporation,

Defendants.

Appearances:

EARLE W. ZINN and JOSEPH DIAMOND,
of LYCETTE, DIAMOND & SYLVESTER,
WALTER SCZUDLO, of
COLLINS & CLASBY,

Attorneys for plaintiffs: Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, individually and as Directors and Stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc., and for defendants First National Bank of Fairbanks, a corporation, and Bank of Fairbanks, a corporation.

NICHOLAS JAUREGUY, of
CAKE, JAUREGUY & HARDY,

JOHN HEDRICK, of
MORRISSEY, HEDRICK, ROBERTS &
DUNHAM,

Attorneys for all other defendants.

Before: Hon. Harry E. Pratt, District Judge.

October 5, 1953

Be it remembered, that the trial of Cause No. 7298 was begun at 10:00 a.m., October 5, 1953, plaintiffs and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Clerk: Court is now in session.

The Court: This was the time set for trial of Cause No. 7298, Fairview Development, Incorporated, against Cash Cole, et al.

Are the parties ready?

Mr. Sczudlo: The plaintiff is ready.

If the Court please, at this time I would like to move for the entry of the appearance, on behalf of the plaintiffs, of Mr. Josef Diamond of the Washington State Bar and also Mr. Earle W. Zinn of the Washington State Bar, for the purpose of trying this case with local counsel.

The Court: Very well. Request granted.

The defendants are ready?

Mr. Jaureguy: Yes, your Honor, the defendants are ready.

The Court: Do you wish to make opening statements? [3*]

Mr. Diamond: Yes, the plaintiff would like to make opening statements, if your Honor please.

I don't know whether or not the Court has had an opportunity of reading the pleadings, but I would like to call the Court's attention first to the parties. There are quite a number of parties and it

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

might be confusing as to the various names and the people who will be testifying and their position in connection with this suit.

This lawsuit is brought by Fairview Development, Incorporated, an Alaska Corporation, and by Nelse Mortensen, Cliff Mortensen, and Frank Henderson, individually, and as directors and stockholders of the plaintiff corporation for and on their own behalf and on behalf of all other stockholders in the plaintiff corporation, Fairview Development Corporation.

There are present here in the courtroom and available throughout the trial, and I believe they all will testify, Mr. Cliff Mortensen, one of the plaintiffs and stockholder of the corporation; Frank Henderson, another stockholder and director of the corporation, but Mr. Nelse Mortensen, however, is ill and will not be present in the courtroom. The suit is brought against Cash Cole, who is here; Everett Nowell, who is here or who will also be here, individually and as officers and directors of an Alaska corporation known [4] as the Bayview Realty Corporation, and it also names as defendants the two local banks, but only for the reason that the banks have in their custody and possession money belonging to the Fairview Development Corporation, the plaintiff, and because of the relief requested by the plaintiffs. If the relief is granted we thought it would be advisable to have the banks where the funds of the corporation would be available subject to the order of the Court.

Actually, there is no real controversy between

the plaintiffs and the defendant banks except that the defendant banks do have possession in and custody over funds belonging to the plaintiff corporation.

Now, the suit requests that the defendants, Cash Cole, Everett Nowell, and the Bayview Realty Corporation be required to render a full and complete accounting of all funds received by them, or any of them, belonging to and the property of Fairview Development Corporation, together with a full accounting of all disbursements made by them, or any of them, from the funds of the plaintiff corporation or purportedly on behalf of the plaintiff corporation; that the defendants be required to account for the reasonable rental value of apartments belonging to the plaintiff corporation [5] and occupied wrongfully by the defendants; and upon said accounting that the plaintiff corporation have a judgment against the defendants for such amounts as will be found due, together with interest thereon.

The complaint also asks that the defendants Cash Cole, Everett Nowell, and the Bayview Realty Company, and each of them, be removed and disassociated from the management and control of the property and assets of the plaintiff corporation and that they take no further part in the affairs of the corporation by reason of their acts and conduct that will be shown by the evidence in this case.

The plaintiff corporation, Fairview, as it was finally organized, is divided really into a corporation having 900 shares of stock. There are actually

1,000 shares of stock. There are 900 shares of common stock with voting rights. There are 100 shares of stock which belong to the F.H.A., which is preferred stock having no voting right in the corporation except under certain peculiar circumstances which are not material here in this lawsuit. The 900 shares of stock are divided: 150 shares for Cliff Mortensen, 150 shares for Frank Henderson, and 150 shares for Nelse Mortensen, making 450 shares, or exactly one-half of the control of the corporation in the Mortensen-Henderson people, [6] the plaintiffs in this lawsuit.

For brevity's sake, we will refer throughout the trial, I believe, to the Mortensen interests.

The other 450 shares of stock are owned by the Bayview Realty Corporation. I point out that the evidence will show that they are owned not by the individuals Everett Nowell and Cash Cole, but are owned by the defendant Bayview Realty Corporation.

Now, the Fairview Corporation was organized for the purpose of owning a large apartment house development here in the city of Fairbanks. Bayview Realty Company had the opportunity, through some work their officers had performed, in obtaining a 75-year lease on the property on which Fairview Manor is now constructed and exists. They approached the Mortensen interests with a view to having them go into an organization and forming a corporation for the construction of this F.H.A. project, and such an arrangement was made.

The record and the evidence will show that

when they first approached them, the Bayview Realty had no money or corporation and put no money into the operation whatever. They did put forth their efforts in obtaining the lease to the property on which the project was to be built. In consideration of that, the Fairview Development Corporation was to be formed, with the [7] Mortensen interests having two-thirds of the ownership and control of the Fairview Manor, the Fairview Corporation and the Bayview Corporation having one-third.

The evidence will show, though, that from the very start the defendants, and particularly the defendant Cash Cole, had the deliberate intent and purpose of taking over this project, cheating and depriving the Mortensen interests of their interest in this property, to get control of the Fairview project and the Fairview Manor. And from the very beginning the evidence will show that in order to beat the weather and start the construction, that pursuant to preliminary negotiations with Fairview having two-thirds interest and Cash Cole and the Bayview group having one-third, construction was started prior to all of the paper work being completed in the project. So that when it became time to complete the paper work the project had to go forward insofar as the Mortensen interests were concerned because they were committed in large sums of money, and by Mr. Cole particularly in the position of being able to obtain, instead of his one-third interest, a fifty per cent ownership in the Fairview Corporation, which he extracted and re-

ceived, and the stock, as I stated, was issued: 450 shares to the Bayview Corporation and 450 to the Mortensen interests, being equally divided. [8]

Along with their original arrangement it was anticipated that the construction of the apartment houses could be done for a sum of money less than the amount of the Government mortgage. The Government mortgage was to be, and was in fact, \$3,080,000. It was anticipated that the apartment houses could be built in accordance with the Government-approved plans and specifications for a sum less than that by the Mortensen people, who the evidence will show are builders and contractors, for many years in the construction business.

It was agreed along with the same arrangement on the ownership that the Bayview Realty Corporation would be entitled to one-third of the net profits on the same basis that they were to have one-third of the ownership. That was never changed, so that the Bayview Corporation is entitled to under the documents as finally completed one-third of any net profit in the construction of the Fairview Manor—any net profit, difference between the actual cost of construction and the \$3,080,000 loan by the Government under the F.H.A. through the National Bank of Commerce in Seattle.

The apartment houses, so we get some idea of the size of them, the evidence will show that there are 272 units, four fairly substantial buildings; that when [9] the documents were put together the amendment or the articles of incorporation as originally prepared by Mr. Cash Cole, though not a lawyer, had to be amended I think on three oc-

casions in order to comply with the law and to comply with the regulations and requirements of the Federal Housing Administration, who were going to loan the money.

The articles of incorporation provide for not less than three nor more than five directors, without naming them, in the articles as finally amended and filed. The minutes were drawn up and four directors were named and agreed upon, the four directors of the Fairview Corporation being Cliff Mortensen, Frank Henderson, Cash Cole, and Everett Nowell. So the directorship was evenly divided.

That was concluded on June 15th of 1950. The next day, on June 16th, the parties entered into a voting agreement, and pursuant to that voting agreement they recited that there were three directors, though the minutes of the corporation, the only ones we were able to locate, show that there are four, recited that there are three, Everett Nowell, Cash Cole on the one side, and Cliff Mortensen on the other side, and went on to provide that each side would have one vote. That is, [10] when they speak of sides they were talking about Cash Cole and Everett Nowell as being one side, and the Mortensen interests being the other, Cash Cole and Everett Nowell being at least the majority stockholders in Bayview Realty Company, this other corporation in which the Mortensen interests had no interest on the subject. The Bayview Realty, I think that was their own, although I think there were others interested in it.

This voting agreement provided that no action

by the board of directors or plaintiff corporation, Fairview, would be binding or would be valid unless it was approved and agreed upon by each side, each side having one vote, so that it was kept equal right down the middle from the time that it was changed from the Mortensen interests having two-thirds, which is the original arrangement. It was changed and fixed and intended that the Bayview or Cash Cole group would have one vote and the Mortensens would have one vote, exactly fifty per cent of the stock ownership and exactly fifty per cent in the directorship.

The construction went ahead not quite as fast as everybody hoped, but it did go ahead, and the evidence will show that sometime in April of 1951, construction having started sometime in the middle of the summer, I [11] believe, or prior to that in 1950, to the following year, in April of 1951 it began to appear that some of the apartments would be ready and available for occupancy and arrangements should be made by the Fairview Corporation to rent them out.

I might say before we get to that, the construction of the apartments then was done by the Mortensen interests forming a corporation, a corporation they called Nelse Mortensen-Alaska Corporation, a corporation—I think it was a Washington corporation—be authorized to do business here. A contract was given by the Fairview Corporation, the plaintiff here, to the Nelse Mortensen-Alaska Corporation to build the apartments in accordance with those plans and specifications for the amount

of the mortgage money, \$3,080,000. The contract provided that all of the loaned money would go to the construction company for the construction of the apartments; that during the construction the construction company would pay all of the costs and expenses in connection with the construction; in other words, during construction there were items of interest, insurance, taxes, and they were to be paid by the construction company because the Fairview Development Corporation, the ownership company, in fact had nothing but the lease to the property, and all of the construction money coming from the Federal [12] Housing Administration went to the construction company. The construction corporation was owned entirely by the Mortensen interests. Like the Bayview Corporation owned entirely by the Cash Cole interests, the construction company was owned entirely by the Mortensen interests. There was an agreement, however, that the construction company would pay over one-third of any profit to the Bayview Realty Company, which was the one-third of the construction profit, if any. The construction company, while Cash Cole and Everett Nowell had no monetary interest they each were made vice presidents of that corporation. They had no interest in that corporation but they were and they are interested in the profit that that corporation may make, and they would be and are entitled to an accounting for the profit in the construction of the apartments. I speak of that in the future, while it is not presently in this lawsuit, the completion of the wind-up of the construction

company by reason of things never mentioned, the actual profit has not yet been determined, but that is not a subject matter in this litigation here.

When in April it was determined that the apartments were getting ready for completion, Mr. Everett Nowell determined that there should be a meeting and some [13] arrangements made for operating Fairview Manor and these apartments. It makes it necessary for me to outline briefly the previous arrangement. The agreement was that after the completion of the apartments, Bayview Realty Company would take over the management of Fairview Manor for the Fairview Development Corporation. In other words, Bayview Corporation, that is, Cole and Everett Nowell and whoever else might be interested in it would manage the apartment house for the ownership company. In the agreement for that it did not go any further than stating that they would have the management. The evidence will show that how much they were to be paid for the management was a subject which was in considerable dispute and it could not be determined. So that in the agreement, one or two that were drawn saying that Bayview should have the management, it merely went on and provided that the terms of compensation would be such as the board of directors of the Fairview Development Corporation should determine, but did not fix it. So when it became apparent that the apartments were going to be available piecemeal instead of all at one time, there was a demand for use and occupancy, rentals could be obtained, Everett Nowell

requesting that a meeting of the directors and stockholders of Fairview Development, the ownership [14] corporation, to make such arrangements as would be necessary.

Now I think we had better point out what the evidence will show insofar as the officers of Fairview Development and talk about the rest of it being evenly divided.

The president of Fairview Development Corporation was Everett Nowell. The secretary-treasurer of Fairview Development Company was Cash Cole, and an assistant secretary—I don't think it is too important, but an assistant secretary was elected, first Mr. Peret. Subsequently he resigned, almost the same time, and A. R. Mortensen, not directly related to the Mortensens, was an assistant secretary elected.

Cliff Mortensen was a vice-president of the corporation. However, other resolutions provided that Cliff Mortensen should also be president, so that there were two presidents of Fairview Development Company. I don't know about the legality of it, but it existed. Apparently it was a practical approach to the problem because Cliff Mortensen was in Seattle taking care of the financing and they needed the president's and secretary's or assistant secretary's signature, so he was designated the president to handle whatever had to be [15] handled in Seattle, and Everett Nowell previously had been made president. Anyway, Nowell determined that a meeting should be called of the stockholders and directors. The evidence will show that Everett

Nowell wrote a letter to Cliff Mortensen on May 25, 1951.

(Mr. Diamond read the letter of May 25, 1951, referred to.)

When he refers to "Ken" he is talking about Ken Kato. I think the evidence will also show that Ken Kato has an interest in the Bayview Realty Company along with Cash Cole and Everett Nowell. And when he refers to "Joe" in the letter, he is referring to me, Joe Diamond.

Pursuant to that letter, a meeting was arranged of the stockholders and directors of the Fairview Development. Notices were sent out signed by Mr. Nowell as president, and all of the stockholders and directors were present in my offices as attorneys for Fairview Development on June 11 and 12, 1951, which is prior to any of the apartments being rented or becoming available for rental for the purpose as requested by the president—one of the presidents—that arrangements be made to rent the apartments which were in demand. Present at the meeting were all the stockholders and all [16] the directors, Nelse Mortensen, Cliff Mortensen, Frank Henderson, and Bayview Realty Corporation. Also present were Everett Nowell, Cash Cole, and Joseph Diamond. Frank Henderson was present on June 11th, meetings being held June 11 and June 12th.

Then it went on to provide that in view of the fact that a regular annual meeting of the stockholders and directors was not held, and the evidence will show that none were ever held as provided for,

the following directors were unanimously elected: Everett Nowell, Cash Cole, Cliff Mortensen. These minutes would change the number of directors, in that previously, in June of 1950, there were four. These minutes changed it to three: Everett Nowell, Cash Cole, and Cliff Mortensen, "with the understanding and agreement that the directors shall continue in office with authority to act, etc.," in other words, the parties re-elected three of them as directors but provided that the voting agreement should remain, giving one vote to each side, keeping it strictly neutral, each having equal say in the directorship of the apartment houses, and then, because there was dispute as to the officers, there being two presidents, they re-elected and elected the following officers: Everett Nowell as president, Cliff Mortensen as vice president, Cash Cole [17] as secretary-treasurer, and A. R. Mortensen as assistant secretary-treasurer.

Then, at the same time the motion was made and unanimously carried, after these others were approving checks which had previously been signed and delivered on behalf of Fairview Development Company. There was some dispute as to who was president, and there were two presidents, some question raised by the banks as to signatures on checks, so the motion was made and passed approving all signatures on all checks in the past, because no one knew anything wrong about any of them.

Everett Nowell, as president, had signed some checks properly, but there was some question as to

whether he had authority to sign them. There wasn't anything wrong with him signing checks, that is, no running off with any money, but there was some question as to whether he had actual legal authority to sign. Then some other matters were taken up with respect to claims against the corporation for extras that were being made by Mr. Rushlight and some possible claims by the construction company, that is, the Nelse Mortensen-Alaska Company, in connection with some extras, and note was made of those matters.

The minutes went on about arrangements [18] made for leasing apartments, Bayview Development, Inc., having the right to manage them, leased in the name of the Fairview Development, but Bayview Realty acting as agent, etc. In other words everything was to be done in the name of Fairview. Bayview would approve all charges before they were actually paid by Bayview, but they would actually be paid by Fairview Development.

The evidence will show by Everett Nowell, as the certified public accountant that Herbert Lofquist, or under his direction, someone acting for him in Alaska, did keep the records and accounts of Fairview Development and have the authority to deposit income to the corporation in the corporate account and draw checks on the corporation in payment of the obligations, etc.

The evidence will show that when Mr. Nowell wrote down asking for this meeting as president or wanting arrangements made, he wanted the funds handled and controlled not by Bayview

Realty, in which he had some interest, but by an accountant or someone who was to be bonded, and not by Cash Cole, and this arrangement was set up, the evidence will show, for Everett Lofquist, a certified public accountant, to be bonded and to handle the money but that Bayview Realty would have the supervision as far as management but would not handle the funds in connection with the operation, and no one else, neither the Mortensens [19] nor the Cash Cole interests, none of them. It provided that all expenses should be paid by check as due, etc. That motion provided for prorating insurance costs and taxes and interest, and the reason for that was that during the construction the construction company was required to pay the taxes and the interest and the insurance. They had all of the funds that came from the F.H.A but now they were turning over apartments piecemeal. It was not as contemplated, all at one time, but piecemeal. They were turning over apartments to the ownership company. The ownership company, Fairview, was going to rent these apartments, would get the rental income from the apartments and pro rata would pay their own insurance and taxes on their apartments as they took them over, and that is the reason for that provision.

Then the minutes went on: moved, seconded and unanimously agreed that as the corporation took over any apartments the corporation would execute a proper release to the construction company. In other words, as the apartments were turned over piecemeal to the ownership corporation, the

evidence will show that they were to accept them so that subsequent damage by tenants or anyone else would not be charged to the construction company, but if there were any defects or [20] anything wrong that did not meet the F.H.A. approval the construction company would still be responsible. The construction company had agreed to construct in accordance with F.H.A. requirements.

Then there was a motion as to payment for management. The evidence will show that Cash Cole and Everett Nowell were, as vice-presidents in the construction company, receiving compensation from the construction company, which they were in any event to receive one-third of the profit, and they were already receiving some income in the way of salaries or compensation from the construction company. It was contemplated as the apartments were being turned over piecemeal, until they had enough turned over and enough coming in, that there would not be any management expense because there wouldn't be any money to pay for it with and there wouldn't have been earned sufficient to justify it. So that was passed.

Then it goes on to the determination of proper management directors of the corporation. No agreement could be reached. It would have been a fine time to arrive at proper compensation, but no agreement could be reached, so it was left to the directors to determine, which was evenly divided, at some future time. [21]

While they were not to get any management fees, it was recognized they were going to come

up for Bayview Realty and rent the apartments and incur expenses and those expenses would be taken care of by the ownership corporation.

Then, one other item that is called attention to in these minutes. The evidence will show, while they may be a peculiar place for that kind of a provision, as indicated by Everett Nowell in his letter, Cash Cole was controlling Bayview and Everett Nowell was afraid of that situation, so he insisted this didn't help the Mortensen interests one bit but Everett Nowell insisted that in the management by Bayview Everett Nowell would have an equal say with Cash Cole, the same way that the management or the directors of Fairview was divided right down the middle. This provided, as far as Bayview, as between Cash Cole and Everett Nowell, they would each have equal say.

After that meeting, after those minutes were drawn up and signed by the Mortensen interests and copy sent to Mr. Lofquist, certified public accountant, and requesting that he incorporate the minutes into the records and organization and that he take steps to open the bank accounts and he was to sign checks, the [22] evidence will show Mr. Lofquist went ahead and took such steps, got resolutions from the bank, but ran into a stumbling block. Everett Nowell and Cash Cole refused to sign the minutes. The minutes, however, were signed by the others. The evidence will show that the minutes are exactly what transpired at the meeting and what was unanimously agreed to by all parties, and Mr. Lofquist was notified that they

were the minutes of the corporation. In any event, it didn't have to be signed but were merely evidence of what transpired at the meeting.

Now, pursuant to that meeting Cash Cole and Everett Nowell, the evidence will show, came north and took over the renting of the apartments in the Fairview Manor.

Now, the evidence will also show that about that time claims were being made by a subcontractor, A. J. Rushlight and Company, in connection with plumbing. Rushlight Company had the subcontract for the plumbing from Nelse Mortensen-Alaska. The subcontract was for \$449,000.

Your Honor is probably familiar, at least it is a matter of record in this jurisdiction that there is a lien foreclosure action by the Rushlight Company against Fairview Development and the city because [23] it is a leasehold, and others including the Mortensens to foreclose a mechanics' lien against Fairview for work performed by Rushlight. That foreclosure action is for, I believe, \$356,000, which the evidence will show represents about \$326,000 over and above the original contract price of \$449,000.

Now, the evidence will show that Mr. Cash Cole, in his endeavor to grab and take over this project and completely keep it not only from the Mortensen interests but also from Everett Nowell, endeavored to encourage that foreclosure action against the Fairview Development Company and aided and abetted the Rushlight interests in pushing that foreclosure action against the very com-

pany he owned a substantial interest in, the Fairview Development; that he has since aided by furnishing information to attorneys representing the Rushlight Company and by other actions which will be disclosed here in the courtroom in endeavoring to cause dissention and difficulty, and the witness will say in his own words so that he could end up owning the Fairview Development Company without any partners.

Then at the same time Mr. Cash Cole proceeded to ignore this meeting, the minutes of which he would [24] not sign, and took over and started to run Fairview Development as though it was his own property, paying very little if any heed even to Everett Nowell except when he felt he needed the support of Everett Nowell. Then he would join with him on some basis.

The Mortensen interests did not learn until some time later, the exact date I have forgotten, that Cash Cole had retroactively started paying himself \$1,000 a month for his services in managing the Fairview Development. At the same time he started paying Everett Nowell \$1,000 a month for managing Fairview Manor. At the same time he took an apartment for himself free, and at the same time he gave an apartment to Everett Nowell free, and the evidence will show Everett Nowell had at the expense of Fairview Development built a bar in his apartment for some four or five hundred dollars for his additional use and benefit.

The evidence will show that Everett Nowell, as a factual matter spent very little time—you can

count it up in days over the past two years that he has been drawing \$1,000 a month up here at any time. And then the evidence will show he was here working for Alaska Freight Lines and did not, except for maybe a matter of a few days, at any time during the two years perform any services for Fairview Development, for which he has [25] been receiving \$1,000 a month for I think it was dated back to July of 1951, ran through November of 1952. The month of December, 1952, Everett Nowell was not paid \$1,000 a month.

The evidence will show, first, Mr. Cash Cole says, "Times were tough and we took Everett Nowell off the payroll. We didn't need him any more." The evidence will show that didn't sit too well with Everett Nowell and in order to change that situation the evidence will show that Everett Nowell is now to be paid retroactively his \$1,000 a month again.

There is testimony under oath both ways; first, that he is off the payroll and he is not to receive any pay, and then that he has always been entitled to \$1,000 down to the present time and at the present time. The evidence will also show that the apartments over at Fairview Manor are rented unfurnished; however, Everett Nowell's apartment is furnished and the expense of the furniture, \$3,000-odd charged to Fairview Manor. No meeting of any description at any time with regard to any of these matters. Cash Cole and Everett Nowell doing what they pleased with the corporation money. The evidence will show that Cash Cole's

apartment is furnished with furniture to the tune of \$4,200 or [26] \$4,300, paid for by Fairview money. What kind of furniture? The evidence will show that he bought silverware, linens, dishes, paid for by Fairview. Compensation, \$1,000 a month, apartment, furniture, free, two pick-up trucks for their use, personal as well as business, all at the expense of Fairview. Directors' meetings approval, none.

Now, the evidence will also show, and I believe without any notice to Mr. Nowell, Mr. Cole was not satisfied with the unfurnished apartment so he cut a hole in the back of the one he had and he now has two free.

What else will the evidence show? That Mr. Cole in December, right after Christmas 1951, left Fairbanks, hired another manager, paid him first \$650 and then \$800 a month plus an apartment; left Fairbanks in December, right after Christmas in 1951 and did not return until May 27, practically June, five months when he was away. During that five-month period Mr. Cole took \$1,000 a month for each and every month as manager. Mr. Everett Nowell, who during that five-month period spent not over a week, or as a matter of fact any of the time, took \$1,000 a month for managing. The apartments were there, paid for, [27] furnished.

On another occasion the evidence will show Mr. Cash Cole left for three months and was paid. Now the evidence will further show that Mr. Cole not satisfied, so he hired his wife and paid her

\$200 a month, sometimes \$400 a month. She did some work. He also paid her some of that salary while she was in Seattle or California.

Then, Mr. Cole has more family. He has a son, James Cole. He was employed at \$800 a month, given an apartment free. I can't tell you about the furnishings. Given the use of a pick-up. Mr. James Cole made the mistake of letting Seattle Trust, who is servicing the mortgage on the apartment houses, see the books and records of the corporation, so he was fired. The son is gone. But he has another son. So his other son came up and he has been employed. He is there now, \$800 a month. Cash Cole is there at \$1,000, Everett Nowell is there at \$1,000 a month, all of them have free apartments, Cash Cole with two.

Then, Mr. Cole has other relatives. He has some relative who he put on as a watchman. The evidence will show that he watched a little bit, slept most of the time, and he got \$500 a month. I don't know whether he got an apartment or not. He got into a fight with Mr. Cole and he is no longer there. They don't have any watchman. They don't need a watchman. [28]

Mr. Cole has some other relatives. The sons are married. Both of them worked, the wives, two or three hundred dollars a month. The rate was \$1.50 an hour, I think is the way it is set up on the books.

In addition to the two times I mentioned, Mr. Cole was away for long periods. The evidence will show he made a lot of little trips. He sent the bills

for all of the expenses back up here to be paid, hotel bills from Seattle, Pine Crest Lodge, from California, paid by Fairview. The expenses to and fro were were paid by Fairview Development.

The evidence will show that the Mortensen interests have received nothing at any time from the Fairview Development excepting a bad time. The foreclosure action by Rushlight being defended in the name of Fairview by lawyers employed by Mortensen, Mr. Cole sets himself up as manager. Mr. Nowell as president. Are they defending a lawsuit against Fairview? Are they paying the bills? No.

The evidence and records will further show that Mr. Cole employed a lawyer down in Seattle. First he employed the same lawyer that Everett Nowell employed, Mr. Morrissey, who represented him in an endeavor to get a contract which would approve these payments which he [29] had been taking for himself without right.

Then the evidence will show when Mr. Morrissey wouldn't start a lawsuit, there wasn't any basis he could put one on, Mr. Cole employed Mr. Sam Wright in Seattle, and the evidence will show that Mr. Cole went down without even Mr. Nowell's approval or consent and gave Mr. Sam Wright \$2,500 as a retainer. And whose money? Fairview Development—to bring a suit against the National Bank of Commerce and the Mortensen interests, alleging conspiracy. Conspiracy to do what? To pay over the money from the loan to the construction company. That suit is pending. Never approved by

the board of directors. Never approved by the corporation. \$2,500 spent as a retainer. How much more is due I don't know whether anyone knows.

Then the evidence will show that Mr. Cole was unhappy with Mr. Wright's office, so he employs Mr. Horswell of a firm in Seattle, and he calls a meeting of the directors one evening. Everybody attends. The voting trust agreement is shown. Each has one vote on one side. Nothing is accomplished. There is a deadlock. I don't know whether the record will show about payment. A bill was incurred by Mr. Cole without approval of the directors of the corporation. Mr. Horswell didn't accomplish anything, so Mr. Cole hires more lawyers, Mr. Deneke from Portland. Mr. Rushlight says he is a fine man, "he is the man who will get the job done for you." [30] What job? To take over Fairview Manor so Cash Cole will own it. So Mr. Deneke is employed by Fairview. I don't know what Mr. Deneke does. He comes up here from Portland.

That is not the end. Mr. Cole has to keep in with Mr. Nowell because he doesn't have an equal 50 per cent until he does, so he has to go back to Mr. Morrissey's office because Mr. Nowell is loyal and is satisfied with the representation of Mr. Morrissey. So he is back there and Mr. Morrissey represents Cash Cole again and he is paid some money to come back here and attend a meeting. I think that is not right. Mr. Morrissey did not come to the meeting but did come up on behalf of Fairview at the request of Cole.

Then we get to this trial. This is a suit against

Mr. Cash Cole and Mr. Everett Nowell and the Bayview Realty by the corporation, a stockholders' suit. I don't know just how much of the expense has been charged to the corporation, Fairview Development. I know some of it has, and if it wasn't for this lawsuit and this statement the rest of it would be.

The Court: Mr. Diamond, I think we had better have a ten-minute recess at this time.

Mr. Diamond: Thank you. I can use it. [31]

The Clerk: Court is recessed for ten minutes.

(A ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Are you ready to proceed, Mr. Diamond?

Mr. Diamond: Yes.

With reference to the expenses of management, the evidence will show that during the time that Mr. Cole was managing that the long-distance telephone calls have cost the operation something in excess of \$2,500 a year, and the evidence will show that that is because Mr. Cole was not here, and attempting to carry on by long-distance calls while he was still drawing a salary for running the job. I have already mentioned that the evidence will show that Mr. Cole lined himself up with Mr. Rushlight in an effort to cause difficulty and bring about the ownership of the project by himself, or possibly himself and Everett Nowell.

The evidence will show that on October fourth Mr. Cash Cole wrote a letter to the certified public accountant in which he said: "Dear Dick"—that

would be Dick Rushlight. "I think he should have a competent architect," etc. "Don't say anything to Morrissey." That would be Steve Morrissey, Mr. Nowell's attorney, "as I don't want any more talk with them." By that [32] time he was with Mr. Horswell, I believe, and then later back with Mr. Morrissey.

Now, with this expensive management, and the records will show that during 1951, when Mr. Cash Cole and Mr. Nowell came up here, and Mr. Nowell only for a matter of days, took over the management—that was in August—no, it would be after the June meeting, the 11th and 12th, 1951. The apartments weren't available just then to rent but they came up shortly after that meeting when those minutes were passed. There was paid from that time down through December \$14,500 to Mr. Cole and to Mr. Nowell for management.

In addition to that, Mr. Robert Sheldon, an assistant manager, had been employed and he got \$1,351 during that period of time, originally charged to management, and then they transferred it because management expense was getting too high. So the records will show that has been now transferred to office salaries. In 1952 this management cost the Fairview, as the records will show, \$23,000—\$1,000 a month to Cash Cole, and all except one month, 11 months for Everett Nowell.

I don't know what the evidence will show today with reference to that one month as to whether Everett Nowell still has it coming or whether he

doesn't and [33] whether or not he is getting \$1,000 as of the present time.

The books and records will show that Mr. Everett Nowell is not on the payroll, hasn't been since December first, but the testimony in a deposition of Cash Cole will show that Everett Nowell is on the payroll, is earning his money and is entitled to it.

The evidence will also show that Mr. Cash Cole said when he took him off the payroll, "Everett Nowell has never earned any money and there is no reason for carrying him, particularly when we are short of money." What the evidence will show today as to whether Mr. Nowell is being paid or not we can only tell you what the books and records will show.

For this expensive management what do we have? We have a report from the Seattle Trust and Savings Bank representing the mortgage holders and that report shows the most extravagant management any apartment house could have—waste and mismanagement, as shown from the books. The 1951 income tax shows a loss in excess of \$40,000, occupancy 100 percent, loss over \$40,000. The income tax returns were signed by Mr. Cole and the accountant. 1952, a full year's operation, loss: \$56,000. Occupancy, for a short time in 1952 [34] there was an exodus of 90 tenants in one building, a substantial loss for a period of a month in occupancy. Other than that, 100 per cent occupancy. On a percentage basis the occupancy was way up always, but the loss for 1952: 56,000-odd dollars, for management receiving \$23,000. You don't count the apartments,

the pick-ups, the furniture, the trips to California. That is the management.

On a comparable basis, and the evidence will be introduced and show that on a per-room basis, it is just way out of line with any comparable project.

The evidence will show that Mr. Everett Nowell requested before he ever came up here that Cash Cole sign a fiduciary bond and a bond was written by a surety company and application sent to Cash Cole for signature, as required by the bonding company. And the evidence will show that the bonding company, after many months canceled the bond because Cash Cole wouldn't sign an application, and he has been here with the money, tremendous amounts, \$40,000 a month, something like that, coming in in rentals, without a bond and without any control, no stockholders' meetings, no taking up matters with anyone. Occasionally, very occasionally, with Mr. Nowell. Mr. Cole decided that there ought to [35] be a new well built, and he started to build a well, and the evidence will show that his express language was, "To hell with the health department. I don't care whether it complies or not. I know it doesn't." And he built a well. The agreement was that it would be at a cost of some \$15,000—I don't think any definite agreement, but he ended up with that kind of money in a well. He just finished it. I don't know whether he was getting water or not but at the time he finished it the city water runs right by the place. The evidence will show that there are two wells that have been running to the apartment house. The evidence

will show that an additional source of water for emergency would be advantageous. So Mr. Cole, without talking to anyone, or getting any stockholders' approval, starts digging a well in a place that is not authorized. At the time it is finished the emergency water in the form of city mains is right in front of the apartment. \$15,000.

Then the evidence will show Mr. Cole made arrangements, or, rather, the son who was managing while Mr. Cole was away, for that well to be turned over to another project across the street, and because the deal was made by his son Mr. Cole came up and canceled it. [36]

Now, the evidence will show that Mr. Cole, without consulting or taking the matter up with the board of directors, determined that a blower system for disposal of the ash should be put in the apartment houses. Very commendable if you can do it economically. So he spent somewhere in excess of \$15,000 without approval of anyone for a blower system for ashes, which is now in the ash can. It can't be used. It isn't any good. Never was any good. And instead of trying them—there are four buildings and four heating plants, he didn't try one to see if it would work, built four of them and threw four of them away.

Then, the evidence will show that he determined with the help of Mr. Rushlight that there ought to be a blower system on the smokestacks that weren't blowing, so he hired Mr. Rushlight and a man to install a blower system on four of them. He is litigating. \$400,000 worth of litigation between

Fairview Manor and Mr. Rushlight—not Mr. Cole. That is not his lawsuit. That is only the corporation's lawsuit. So the evidence will show that they spent money on this blower system, for four of them. They installed one and then they take it out and throw it away. The parts for four of them are here in Fairbanks. Do with them as you like. Management [37] receiving the kind of money we have been talking about, a board of directors with construction people on it who built the place contacted? No. That is the Mortensen interests. Stay away from them. And the evidence will show more than one person got fired because they talked with the Mortensens or indicated they were friendly to them.

Now, Mr. Cole has started a new project directly across the street from Fairview Manor. He is building 200 units, a little more than that, apartment houses directly across the street from Fairview Manor. As a partner he has Mr. Rushlight, the man he is litigating with, or should be. Going to have a manager, if appointed, in the form of Mr. Cole managing Fairview Manor, with his own project supposed to be finished next year, I guess the early part of next year. It is going to be managed by Cash Cole on one side of the street with an empty new project that he and Mr. Rushlight own, when he is trying to get even with the Mortensens, so if there is any shortage of tenants there can't be much doubt where they are going, with one manager and two projects, with this lawsuit and Mr. Cole in there.

Fairview Development owns a maintenance build-

ing. [38] It has been fixed up. It was a work shop that Mortensens had when they built the place, maintenance building afterwards, it was fixed up as a maintenance building for the project on the Fairview side of the road. Today it is on the other side of the road where they are digging for Cole's and Rushlight's new project.

What else is on the other side of the road? Maybe the evidence will disclose it, I don't know. Mr. Lofquist, who is a certified public accountant, the evidence will show was selected by Everett Nowell. He was a personal friend of Everett Nowell's. As far as the Mortensen interests were concerned he is a competent, honest certified public accountant that has been keeping the books and records. Mr. Mortensen may testify he was over-friendly with Mr. Nowell, but he was the accountant selected and was doing the work.

At the end of 1952 Mr. Cole, secretary-treasurer of this corporation and self-appointed manager, fired Mr. Lofquist without approval of anyone, not the Mortensen interests. I am sure the evidence will show Mr. Everett Nowell did not approve the firing of Mr. Lofquist. So the accountant is gone.

Sometime, I think just a few weeks ago, Mr. Cole employed another accountant. Approval of [39] the board of directors or anyone else? No. Mr. Cole selected him with the help of Mr. Rushlight, and they have a new accountant, Mr. Rushlight's accountant, going over the books.

The evidence will show that Mr. Vine, the new accountant, has determined that all the books must

be gone over from the beginning because Mr. Lofquist didn't know what he was doing, and they are being gone over from the beginning at the cost of Fairview. Mr. Vine is also the accountant for the new project across the street. When he stops working on one project and starts working on another, only Mr. Cole will determine the division of the expense between one project and the other. The evidence will show only Mr. Cole will determine that under the present management.

In October of last year the evidence will show that Mr. Cole decided that there ought to be a meeting of the directors of Fairview Manor, so a meeting was scheduled for October 27. Mr. Nowell called it in Fairbanks. Mr. Nowell agreed to continue it to October 29th because Mr. Cliff Mortensen couldn't be here on the 27th. The evidence will show then Mr. Nowell advised that Mr. Cash Cole didn't care whether Cliff Mortensen could be here or not, that he would have to retract his [40] statement and the meeting would be on the 27th. In the meantime Mr. Mortensen had left for California for a previous engagement. The attorneys for Mr. Cole, at that time Mr. Wright, were contacted and finally they agreed on behalf of Mr. Nowell, the president, and Mr. Cole, that the meeting could be held on the 29th of October, 1952. It was held here in Fairbanks. The notice of the meeting said it was called for the purpose of considering the construction of a generating plant. Mr. Cliff Mortensen came up. I came with him. Mr. Jack Swanson, who is here in the courtroom and will testify, he is a lawyer from Seattle in

the employ of the Mortensen Company, as they are not in general practice he has worked for them. Mr. Swanson came along with myself and Cliff Mortensen and we attended this meeting. The others in attendance were Mr. Nowell, Mr. Cole, and no one else. It was held in the office of the Fairview Development. Mr. Swanson had with him a recording device similar to what you have on the desk, and plugged it in and proceeded to take a record of the minutes of the directors. A special trip had been made clear from Seattle to attend this meeting. Mr. Cash Cole pulled the plug and said, "There will be no meeting if there is any recording made of what transpires." [41]

The evidence will show that the fight was on as far as Mr. Cole was concerned. The machine was replugged and Mr. Nowell dictated part of the minutes of the meeting into the machine, his proposal or the information he had learned with reference to the purchase of a new generating plant which Mr. Cole, Fairview Development, should buy and construct at a cost of something in excess of \$125,000, and I guess that was for the equipment and the installation.

The evidence will show that it is purported that the Fairview Development Company would use that plant to develop the juice for themselves and would sell the juice, no account having been taken of the necessity of qualifying with the public authorities for selling public utilities.

I believe the final record will show that Mr. Everett Nowell and Mr. Cole voted in favor of going

ahead with that project though there wasn't any money in the corporation to do it with, and Mr. Mortensen voted against it and Mr. Mortensen pointed out that they each had one vote under the voting trust agreement, so that it did not pass.

Mr. Mortensen then proceeded to make some motions with respect to requiring the directors and officers, [42] Mr. Nowell and Mr. Cole, to make an accounting for their drawings and pay back any money which was found that they had taken wrongfully and have a determination of a reasonable fee to be made to Bayview Realty for managing.

Mr. Cole yanked the machine off so that no recording could be made other than what Mr. Nowell had dictated with reference to that one item and refused, physically refused to permit any recording to be made, so that the only way we could actually have gone ahead would have been to get into a fist fight.

Mr. Cole insisted that Mr. Nowell shouldn't consider or listen to anything there and in loud and abusive language refused to permit the meeting to go on.

The evidence will show that Mr. Cole said something about the Mortensens robbing the construction contract or something and that I stated if there was anything wrong it was the milking of the corporation by Mr. Cole. Thereupon he attempted to start a fight with me, and Mr. Nowell and myself quieted him down, held him back, and then he proceeded to start a fight with Mr. Mortensen and he ran from the meeting room—no swings or blows, but hollering for help at the top of his voice, "There are three to one against me. Someone come in and [43] help."

The man wasn't in his right mind. He came back later and busted up the meeting entirely.

The evidence will show that as long as Mr. Cole partakes in the meeting—we can't hold one without him under the present situation—nothing can be accomplished in any directors, or stockholders' meeting with Mr. Cole.

As a result of that exhibition and the certainty that there was a deadlock which couldn't be reconciled between the stockholders and directors, because they are each equally divided, this suit was started as a stockholders' suit. The action shows that nothing can be accomplished in a meeting because it is a deadlock and we can't hold one.

This action is brought by the plaintiffs for the purpose of preserving the assets of this corporation for the benefit of even Mr. Cole, as his interests might appear, and Mr. Nowell. We are asking in this suit that they account for anything they have wrongfully taken without right and approval and that which is excessive be paid back to the corporation and that they be removed from the management of the corporation.

The plaintiffs, the Mortensens, are not asking [44] that they be placed in management, that they be given any opportunity to do what Mr. Cole has been doing, milking this company for so long. They are merely asking that this management be taken away from Mr. Cole and placed in the hands of someone who will look after the interest of the corporation, not Mr. Cole's interests. That whoever handles the

funds be bonded. That is all that the Mortensens ask.

I might say that the minutes, the evidence will show, subsequently passed in the corporate records as furnished by Mr. Cole, show that on the 27th of October, two days before, this meeting was continued where Mr. Cole acted so outlandishly, they passed a resolution authorizing, just the two of them, Mortensen wasn't there, authorized Cash Cole to go out and buy and construct and build a public utility plant. That is the minutes. So if they are correct, why, he could go ahead and encumber the corporation, borrow money, it provides, whatever is necessary against the hotel or apartment houses if he could do so.

So we are asking that the kind of management which has existed in the past for the benefit solely of Mr. Cole, to some extent Mr. Nowell, be terminated and that the Court protect the interests of the plaintiff [45] corporation.

Our evidence will show the facts as I have outlined them to you.

(Thereupon Mr. Jaureguy made an opening statement to the Court in behalf of the defendants, transcript of which was not requested by the plaintiffs, who ordered the transcript in this case.)

Mr. Diamond: If your Honor please, may I request that we get a copy of the report which counsel has stated is available, so we could see it? We haven't seen it, and we would like to make use of it

in the evening so we won't be delayed during the trial.

Mr. Jaureguy: Yes, I think that is a very fair request, your Honor, and we are now handing him a copy of the report.

Mr. Diamond: All right.

Does your Honor wish to proceed with the testimony?

The Court: Yes.

Mr. Diamond: Mr. Cash Cole, will you step forward and be sworn, please? I would like to call him as an adverse witness. [46]

CASH COLE

a witness called by the plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Diamond:

Q. Mr. Cole, will you state your full name, please? A. Cash Cole.

Q. And where do you live?

A. Fairview Manor.

Q. Fairbanks, Alaska?

A. Fairbanks, Alaska.

Q. How long have you resided in Fairview Manor?

A. Since around the first of August, 1951.

Q. Where did you live prior to that time?

A. Juneau.

Q. Did you have your own house or a rented place or what? A. I had my own place.

Q. Was it furnished or unfurnished?

(Testimony of Cash Cole.)

A. You mean where I lived?

Q. In Juneau? [47] A. It was furnished.

Q. And your own furniture, or rented furniture?

A. I owned it.

Q. When you moved, did you move that furniture here to Fairview Manor?

A. I sold it with the property.

Q. Mr. Cole, what is your present occupation?

A. As secretary-treasurer and manager of Fairview Manor.

Q. You were elected secretary-treasurer of Fairview Development Corporation, were you not?

A. That is right.

Q. Who selected you as manager of Fairview Manor?

A. It was an agreement, an initial agreement, that gave Mr. Nowell and I the management of Fairview Manor.

Q. A written agreement that gave you and Mr. Nowell the management?

A. Well, it was a written understanding upon which the project was built, you might put it that way.

Q. That Bayview was to have it; isn't that correct?

A. And/or Cash Cole or Everett Nowell. [48]

Q. Do you have such a written document that you may show us?

A. Yes, there is something to that effect.

Q. May I see it, please?

Mr. Jaureguy: Mr. Diamond, I will take a look

(Testimony of Cash Cole.)

and see if I can find it, or I mean I will take a look and I will find it if I have enough time.

Mr. Diamond: Might I go on, counsel, while you are looking for that?

Q. (By Mr. Diamond): Mr. Cole, prior to taking on the duties at Fairview Manor, what was your business and occupation?

A. In the transportation business.

Q. Working for whom? A. Myself.

Q. Under what name and location?

A. Cole Transfer.

Q. Located where? A. Juneau.

Q. And how long had you occupied that position or business? A. Oh, about 45 years.

Q. Will you describe that business, the nature of it, what you did, and the size of it? [49]

A. Contracting and hauling and boat transportation.

Q. Did you have your own equipment?

A. Yes.

Q. What kind, please? A. What kind?

Q. Yes. A. Trucks and a boat.

Q. How many trucks?

A. Oh, six or seven.

Q. How many employees? A. It varied.

Q. From what to what?

A. Oh, from two to three to 25 or 30.

Q. Had you ever been in any other business other than the trucking business?

A. Served as auditor of the Territory for four years.

(Testimony of Cash Cole.)

Q. In Juneau? A. In Juneau.

Q. Mr. Cole, what were your earnings during the time you were running the trucking business and particularly just prior to your moving here in 1951, I believe is the date? [50]

A. More than enough to live on.

Q. And how much was that?

Mr. Jaureguy: I object to that as incompetent, irrelevant, and immaterial.

The Court: Objection overruled.

Mr. Diamond: You may answer, Mr. Cole.

A. Oh, I would say at that time I accumulated about a dock and warehouse that was worth \$50,000, a home that was worth \$15,000, trucks and equipment that were worth \$15,000, and a boat that was worth \$15,000.

Q. (By Mr. Diamond). Did you accumulate any bills and obligations?

A. None that I didn't pay.

Q. Any due as offsets against those assets?

A. I didn't catch the question.

Q. Any bills and obligations which were due as an offset against the assets you just listed?

A. No, except one note in the bank, which was paid.

Q. How much was the note for?

A. At one time \$22,000.

Q. The assets that you listed, then, with the exception of that note, were all free and clear?

A. All free and clear.

Q. The question I asked, Mr. Cole, was not [51]

(Testimony of Cash Cole.)

what assets you had but what your earnings were per month or per year in operating the business.

Can you tell me that?

A. Not without records.

Q. Well, approximately?

A. I added it up in assets.

Q. Over 45 years, if you divided that by 45 years, you wouldn't have an accurate statement, would you?

A. I raised a family of three boys in the meantime.

Q. Mr. Cole, were your earnings in 1950, say, just prior to coming here, more or less than \$5,000 a year?

A. They were more than \$5,000 a year.

Q. Do you have the income tax return to show what your earnings were?

A. Yes.

Q. Don't you remember approximately what they were?

A. Well, you asked for——

Q. I am talking about the year before you came to Fairview now.

A. The year before I came to Fairview, oh, in the neighborhood of \$10,000 a year. [52]

Q. And did that condition exist for many years prior to your coming here?

A. No, there were lean years.

Q. Had you ever had any experience in managing the apartment houses, such as Fairview, before you came here?

A. No.

Q. What was your educational background, Mr. Cole?

(Testimony of Cash Cole.)

A. High school education and some time at the University of Minnesota.

Q. You formed, together with others, a corporation known as Bayview Realty, did you not?

A. That is right.

Q. Who formed that, and what was the purpose of it?

A. Mr. Nowell, Mrs. Cole, and myself.

Q. Any other stockholders?

A. No.

Q. Doesn't Mr. Ken Kato have an interest in that corporation?

A. No.

Q. Doesn't he have an option entitling him to stock in that corporation?

A. He did have. [53]

Q. What happened to it?

A. I imagine it has elapsed.

Q. Didn't he in fact exercise that option by notice to you or to Mr. Nowell?

A. No.

Q. Have you any reason for saying that it has lapsed?

A. It is just simply that the money that was agreed to be paid for the stock was never paid.

Q. It is your statement now that he has no interest whatsoever and is not entitled to anything out of Bayview?

A. He has no interest in Bayview.

Q. Is he entitled to any interest in Bayview?

A. Same answer. He has no interest in Bayview and therefore is not entitled to anything.

Q. Does the majority of that stock belong to you or to Mr. Nowell?

A. It is divided evenly.

Q. Was it at the time you started?

A. Yes.

Q. Has it always been divided evenly?

(Testimony of Cash Cole.)

A. With respect to the value of the stock, it has been divided evenly.

Q. Has the right to vote been other than [54] that?

A. There have been three directors.

Q. And you and your wife have controlled that corporation as against Nowell, the right to control it? A. No.

Q. Who did have the voting right?

A. There has never been any question about the right to vote—the ownership, we have never had any difference of opinion on a vote in Bayview.

Q. You have seen a letter which Mr. Nowell wrote in which he said you had taken control of Bayview and unless the funds were tied up so that they did not go to Bayview or were bonded that he would be deprived of his interest.

You saw such a letter?

A. I heard you read a letter, if that is what you refer to.

Q. And you previously have seen it as a part of an affidavit?

A. I never have been served with those papers.

Q. Is there anything to the contents of that letter, as far as you know?

A. I never had possession of the funds of Bayview other than a small amount.

Mr. Jaureguy: I want to object to going into trying to pry out of this witness any possible [55] disagreements years ago he might have had with his co-defendant, Mr. Nowell.

(Testimony of Cash Cole.)

The Court: Objection overruled.

Mr. Jaureguy: Could I have a continuing objection to this line of testimony, your Honor, so I won't have to repeat it?

The Court: Very well.

Q. (By Mr. Diamond): Now, Mr. Cole, the question is whether or not you didn't control Bayview as between you and Mr. Nowell? A. No.

Q. The Bayview Corporation has never been dissolved, has it? A. Never been dissolved.

Q. I think it is true, is it not, that the Mortensen interests, Cliff, Nelse, and Frank, have agreed that you could dissolve it if you so desire for tax reasons; isn't that correct? A. That is right.

Q. And the reason that was requested of them was because Bayview is supposed to have the management and unless they dissolve the management would have to be in Bayview; isn't that right? [56]

A. That is right.

Q. Mr. Cole, Mrs. Cole was employed by you to work for Fairview Development in the management or in some portion of the management of that apartment house? A. Is that a question?

Q. It is. A. Yes.

Q. In what capacity and what compensation?

A. Well, she relieved the bookkeeper for a period of some five or six weeks. When the bookkeeper was hired she was promised time off at Christmas and when Christmas came, why, she took the time off and Mrs. Cole took her place.

(Testimony of Cash Cole.)

Q. That would be in December of 1951?

A. That is right.

Q. Was that the only time that Mrs. Cole worked for the corporation?

A. That is the only time she had charge of the office.

Q. Well, just tell us——

A. She worked other times. She has worked continuously there but she has been on the payroll about 12, maybe 12 or 13 months that she was paid for, and that was at the rate of \$200 a month. [57]

Q. Who hired her? A. I did.

Q. Did the board of directors ever approve her employment? A. No.

Q. Who fixed her salary? A. I did.

Q. And who fixed the increased amount when she replaced the bookkeeper? A. I did.

Q. Is Mrs. Cole a bookkeeper? A. Yes.

Q. And she had worked as a bookkeeper?

A. Yes.

Q. Where and when?

A. She worked as a bookkeeper for me for seven years.

Q. When? A. Oh, from 1935 to 1945.

Q. How much did you pay her at that time, or how much did she earn when she worked for you?

A. I couldn't tell you without referring to the records.

Q. I think, Mr. Cole, if you would speak just a little louder so that we could all hear you, it would

(Testimony of Cash Cole.)

help, and perhaps speak more to the Court, who is more [58] interested in your answers than I am.

The Witness: Can you hear me all right?

The Court: I am having a little difficulty. You better speak a little louder.

Q. (By Mr. Diamond): If you can tell us approximately how much she earned when she worked for you as a bookkeeper.

A. Oh, she would earn \$125 to \$150 a month.

Q. Had Mrs. Cole ever worked as a bookkeeper for anyone other than her husband?

A. I don't know.

Q. When she wasn't working as a bookkeeper for Fairview and she was making, as you say, \$200 a month, what was she doing?

A. Checking apartments, assigning apartments.

Q. How many hours a day?

A. Taking applications for apartments.

Q. How many hours a day, Mr. Cole?

A. Any time from eight o'clock in the morning to ten o'clock at night.

Q. How did you determine that \$200 would be a fair charge to pay your wife with corporate money?

A. I couldn't get anybody else to do work for that amount of money.

Q. You tried other people living in the [59] apartment?

A. Yes, we have had other people working there.

Q. Now, Mrs. Cole was away down in Seattle and California and other places with you during the time

(Testimony of Cash Cole.)

that you were managing the apartment; is that right? A. Yes, on some of the trips.

Q. And her compensation continued while she was away from here? A. No.

Q. In some instances it did, I think, Mr. Cole, did it not?

A. There might have been one month.

Q. How would you justify paying her for that month while she was with you on a trip?

A. Mrs. Cole has kept all the records that have been required.

Q. Did she take them with her?

A. When we took them out with us to Seattle.

Q. You took the records with you, and for that reason you continued to pay her. Did she do that on every trip you made to California, Seattle, and Washington, D. C.? A. Take the records?

Q. Yes. [60]

A. Our reason for being down there was always with an attempt of settlement of this case.

Q. Let's see if I understand you correctly, Mr. Cole. Your reason for being in Seattle was always in connection with a settlement of this case; is that your testimony? A. That is right.

Q. And she always took the records with her?

A. She had kept the records.

Q. I am not sure you have answered my question. She always took the records with her to Seattle on those trips? A. Yes.

Q. Why didn't you always pay her on those trips?

(Testimony of Cash Cole.)

A. Well, I suppose because it would appear, as you would like to make it, that the family was working.

Q. Wasn't the family working? A. Yes.

Q. Now, you have two sons? A. Three.

Q. Three. One of them never worked for the apartment house? A. No. [61]

Q. Where is he?

A. He is between Anchorage and Fairbanks.

Q. You have one son, Jimmy Cole?

A. Yes.

Q. And he was employed to work for Fairview Manor; is that right? A. Yes.

Q. Employed by whom? A. By me.

Q. Did the Board of Directors approve that employment. A. No.

Q. Did the Board of Directors fix his salary?

A. No.

Q. How much was he paid?

A. He was paid \$800 a month and an apartment.

Q. And who fixed the compensation and the apartment for him?

A. It was fixed by a previous employment of a man named Popescue.

Q. Popescue? A. Popescue.

Q. And what do you mean was fixed by him? Did he fix the salary to be paid to your son? [62]

A. At one time he was hired to work there and he said he wouldn't work for less than \$800 a month and his apartment and his expenses.

Q. Now, Mr. Popescue was employed while you

(Testimony of Cash Cole.)

were away for a period of five months from the project, was he not? A. I think he was.

Q. And Mr. Popescue was made the supervisor with all of the responsibilities of the manager of the business project and you were gone?

A. Not of manager. Of maintenance.

Q. He was called supervisor, was he not?

A. No, he was just the maintenance man.

Q. Who took your place while you were gone during that period of five months?

A. It was operated from the office.

Q. By whom? A. Mrs. Scott.

Q. And during that time Mr. Popescue was paid \$800 a month? A. Yes.

Q. When you came back you fired him?

A. No.

Q. What happened? [63]

A. Mr. Nowell let him go.

Q. You fixed the wages as \$800 a month for your son and gave him a free apartment? A. Yes.

Q. Did you furnish it for him, too?

A. No.

Q. He had his own furniture?

A. He had his own furniture.

Q. You gave him a pick-up to use?

A. The pick-ups are there that have to be around the project.

Q. How many? A. Two.

Q. And, therefore, use in connection with the project business?

A. With the project business.

(Testimony of Cash Cole.)

Q. Mr. Jim Cole could use it for his own personal business in the evening, too, could he not?

A. I suppose he has ridden to town in it in the evening.

Q. How long did Jim Cole work there?

A. About a year.

Q. Why was Mr. Jim Cole let out?

A. His wife didn't like the climate.

Q. Do you recall when Mr. Campbell, vice-president [64] of the Seattle Trust Bank of Seattle, Washington, was here on an inspection tour?

A. Yes.

Q. You weren't here, were you? A. No.

Q. He saw Mr. Jim Cole, didn't he; Mr. Jim Cole showed him the books and records, didn't he?

Mr. Jaureguy: I object to that as purely hearsay, your Honor, because he has already brought out by this witness that he wasn't present.

Mr. Diamond: This witness knows, though.

Mr. Jaureguy: That doesn't make any difference even by a witness that knows. Hearsay evidence is not admissible because his knowledge is gained from hearsay.

Mr. Diamond: I would like to have the witness answer, if the Court please. I think it is proper.

The Court: Make your objection again.

Mr. Jaureguy: He has asked the witness about some facts which transpired which he has already brought out took place when the witness was not in town, when he was away from here, and I object on the ground that it necessarily is hearsay.

(Testimony of Cash Cole.)

The Court: If he is willing to accept a less convincing mode of evidence, it is his funeral. I [65] will overrule the objection.

Q. (By Mr. Diamond): I will repeat the question, Mr. Cole. You know that Jim Cole showed the books and records to Frank Campbell of the bank?

A. No, I don't know it.

Q. Didn't Mr. Campbell tell you that?

A. Mr. Campbell told me that he got particular items from the records.

Q. Mr. Campbell also got some information from your daughter-in-law, Mrs. Jim Cole, didn't he?

A. I wouldn't know about that.

Q. Isn't it true, Mr. Cole, that you fired your son right on the spot for that reason? A. No.

Q. Where is your son now?

A. California.

Q. Where? A. Long Beach.

Q. Doing what?

A. I couldn't tell you at the moment.

Q. Do you know his address?

A. I don't know his address.

Q. Now, after Jim Cole left, or before we get into that, Mr. Cole, what were his duties? What did he [66] do?

A. He looked after the mechanical part of the operation of the place.

Q. Had he ever worked for an apartment house project before? A. I couldn't say.

Q. You don't know what your son did?

(Testimony of Cash Cole.)

A. He was thirty-seven years old and he had been away from home for fourteen years.

Q. Was there anyone else working for the project other than yourself and compensation paid to Everett Nowell that made as much as the eight hundred dollars that you paid your son? A. No.

Q. Did you replace the job after Jim Cole left or was fired? A. Yes.

Q. With whom? A. With Tom Cole.

Q. And who is Tom Cole? A. Son.

Q. And how much did you pay Tom Cole?

A. The same wage.

Q. Did the board of directors hire Tom [67] Cole? A. No.

Q. Did they approve his employment?

A. No.

Q. Did they fix his salary? A. No.

Q. Were they told anything about it?

A. No. Only at the end of the year when the annual report was made, or the quarterly report.

Q. Did that show anybody's name?

A. That shows the names and the salaries.

Q. It does? A. I think so.

Q. Or just the salaries?

A. Doesn't it show the name?

Q. I don't think so.

How long has Tom Cole worked for Fairview?

A. About three months.

Q. And what does Tom Cole do?

A. The maintenance.

Q. What kind of maintenance?

(Testimony of Cash Cole.)

A. There are eight boilers there, four boiler rooms.

Q. Does he fire them?

A. And the pump rooms. No, but he sees [68] that they are fired and that they operate. They are operated by an electronic control, which is very complicated and can't be run by just ordinary labor.

Q. Mr. Tom Cole has worked before for a housing project or an apartment house project like this before?

A. I don't think so.

Q. You know he hasn't, don't you?

A. Not for certain. He is thirty-six years old and has been away from home for fourteen or fifteen years.

Q. You just saw him just before you hired him?

A. He worked for the Alaska Freight Lines just before I hired him. He had charge of the Port of Seward for them.

Q. Incidentally, does Tom Cole own a truck?

A. He may.

Q. You don't know? A. I am not certain.

Q. He doesn't have any truck around the apartment house?

A. There is a truck there I think.

Q. You don't know whether your son owns it or not?

A. I have never discussed it with him. [69]

Q. Does the apartment house own it?

A. There are a lot of trucks around there.

Q. I think we are talking about a particular one

(Testimony of Cash Cole.)

that you have never discussed with your son. Have you ever discussed that with him? A. No.

Q. What kind of a truck is it?

A. It is a big truck.

Q. Make? A. I don't know.

Q. Would it be a White truck?

A. I think it is a red truck.

Q. Is the make of it a White truck?

A. I couldn't tell you.

Q. Is it ever used for apartment house business?

A. No, not that I know of.

Q. Is it ever fixed up at apartment house expense? A. Not that I know of.

Q. Wouldn't you know?

A. I would. I say not that I know of.

Q. As manager, you would know if it was [70] paid for by apartment house expense, wouldn't you?

A. Just as soon as the report came out or the checks were signed, for that matter.

Q. Did you sign any checks paying for any parts for a White truck belonging to your son?

A. No.

Q. You don't know anything about it?

A. Yes, there were parts purchased for a truck, for his truck, and——

Q. Whose truck?

A. For Tom Cole's truck and a payment made by Tom Cole for those parts. They were ordered by Fairview Manor in order that they get a wholesale price and he has paid for it.

Q. You do know about it, then?

(Testimony of Cash Cole.)

A. I know about that.

Q. What kind of a truck is it?

A. I just say I knew about the parts. I didn't know what the truck was.

Q. And you say his truck, so you know it was his truck, and he owned it? A. Yes.

Q. I had to remind you.

Now maybe you can tell us how much you paid with Fairview money for these parts. [71]

A. The record will show.

Q. Well, approximately, and if necessary get the records.

A. I would sooner let it rest with the records.

Q. I ask that you get the record.

A. It is just a matter of memory with me.

Q. Can you get the record and tell me?

A. I don't have the record right here.

Q. Will you make a note of it and get it so we won't interrupt the trial too long? A. Yes.

Q. Now, to what account were these bills charged, Mr. Cole?

A. I couldn't tell you. Just a general purchase.

Q. It would go to automotive equipment, wouldn't it? A. It might be.

Q. It appears as an expense item on the books for the corporation, doesn't it?

A. It would appear as an expense, with a credit to offset it.

Q. What kind of a credit?

A. When it was paid for. [72]

Q. Has it been paid for?

(Testimony of Cash Cole.)

A. It has been paid for.

Q. As of when? A. As of now.

Q. You mean you just paid for it? A. No.

Q. When was it paid by your son?

A. I couldn't tell you the exact date. The record will show that.

The Court: I think we had better take a little recess, ten minutes.

The Clerk: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Clerk: Court is reconvened.

Q. (By Mr. Diamond): Mr. Cole, I notice you carry a package with you. What is it?

A. Just an envelope.

Q. It has something in it. What is in the envelope? A. Not anything of interest to you yet.

Q. Will you mind telling me what is in the envelope, please?

A. It is the report for eight months that has been made. [73]

Q. A copy of what we have just received?

A. Yes.

Q. Thank you.

Now, Mr. Cole, the parts that were paid for by Fairview Manor for your son's truck were about two hundred-odd dollars, weren't they?

A. I don't know about that, Mr. Diamond. I wasn't here when they were purchased and I wasn't here when they were paid for, and we have sent for the records and they will be here shortly.

The Court: Mr. Diamond, it is perfectly satis-

(Testimony of Cash Cole.)

factory to the Court if all the attorneys sit down if they get tired.

Mr. Diamond: Thank you very much.

Q. (By Mr. Diamond): What, specifically, does your son, Tom Cole, do for his eight hundred dollar salary?

A. He manages the hall women, four of them, and three men in the boiler rooms, and two maintenance men, and operates the electrical part of the boiler rooms.

Q. What other help other than those you have just mentioned are there working for Fairview?

A. The bookkeeper and myself.

Q. And he manages everyone except the [74] bookkeeper and yourself?

A. He looks after their work, distributing their work and inspecting it.

Q. And what are your duties?

A. Overseeing the whole thing and whatever is necessary to keep the place going.

Q. You oversee your son, who oversees the rest of your help?

A. Keep an eye on the whole place.

Q. Now, you have some relatives working for Fairview Manor, have you?

A. I do have?

Q. Yes. A. No.

Q. You did have, then?

A. There have been other relatives that have worked.

Q. Suppose you tell me who they are.

(Testimony of Cash Cole.)

A. I had a night watchman.

Q. His name, please?

A. Charles Laumeester.

Q. And his relationship? A. A cousin.

Q. Let's get the names of the others now, the names of the other relatives that have worked [75] there.

A. Unless you would call Mr. Peterson, Mr. Art Peterson, a relative.

Q. Do you call him a relative?

A. He is married to a cousin's daughter.

Q. All right. Who else? A. That is all.

Q. Have you forgotten some others? Some daughters-in-law worked there, too, I believe?

A. That is right. Tom's wife has worked there for two months.

Q. She is working there now; is that it?

A. Yes.

Q. And how about James' wife, does she work there, too? A. Not that I ever knew about.

Q. Wouldn't you know?

A. She didn't work there while I was here.

Q. Did you pay no attention when you were away?

A. I say not that I would know. If she worked, I didn't know about it.

Q. Let's talk about Tom's wife. What does she do?

A. She just answers the telephone and looks after the counter. [76]

Q. They live on the project?

(Testimony of Cash Cole.)

A. They live on the project.

Q. They have a free apartment?

A. They have a free apartment.

Q. And how much is she paid?

A. \$1.50 an hour.

Q. And about how much per months has she received?

A. Well, she works five and one-half days a week.

Q. You sign her pay check?

A. No, I think it was signed by Tom and Mrs. Scott. I don't think——

Q. Do you know approximately how much per month she has been getting?

A. I don't know what that amounts to.

Q. Around \$250 a month?

A. I hadn't figured it up.

Q. And I don't suppose you have the records here but you have them coming?

A. They are coming, yes.

Q. And the board of directors never approved her employment either? A. No.

Q. She has only been working the last [77] couple of months? A. Yes.

Q. Who did her job before she went to work?

A. Mrs. Cole when she was here.

Q. You mean your wife? A. Yes.

Q. Isn't your wife still here?

A. Well, she has been working since she has been back without any pay.

(Testimony of Cash Cole.)

Q. Mrs. Cole, your wife, is now working without any pay? A. Yes.

Q. Is that because of this lawsuit?

A. It is because of the scarcity of money.

Q. Does the corporation owe her for her work, then?

A. No, it is just a matter of donation for the benefit of those who participated in the corporation.

Q. Trying to help out the Mortensens?

A. Trying to keep the thing afloat so it won't go bankrupt.

Q. Now, in addition to your daughter-in-law, then, you mentioned a watchman, some kind of a cousin. What did he do? [78]

A. Just patrolled the place at night.

Q. And how long was he working?

A. He worked about a year.

Q. And then what happened? A. He died.

Q. And who is patrolling the place in his stead now?

A. We haven't had a watchman during the summer months. After he got sick, we hired two or three different fellows, depending upon the coldness of the nights. There are something like sixty doors in that place and if somebody leaves them open you can very easily freeze up your heating system.

Q. Who is the watchman there today?

A. We don't have a watchman today.

Q. How much money were you paying for this relative watchman?

A. Five hundred dollars a month.

(Testimony of Cash Cole.)

Q. Five hundred dollars a month?

A. Yes.

Q. And when he died they stopped that?

A. Naturally.

Q. Now, you also mentioned Mr. Art Peterson and what relation was he to you? [79]

A. He is married to the daughter, a cousin's daughter, Mrs. Black's daughter.

Q. And what does or did Mr. Peterson do for the project?

A. He looked after the electric controls in the boiler room and repaired washing machines and driers.

Q. Were those the same electric controls that your sons Jim and Tom were looking after?

A. We eliminated the work on the washers and the driers because it became so expensive that we had an offer from a firm in town that would put in their own and do it on a commission, which was much better.

Q. This electronics work you are talking about that Mr. Peterson did is the same kind of work that your sons Jim and Tom did when they were there?

A. That is right.

Q. Was it the same type of work that Mr. Popescue did when he was paid eight hundred dollars for which your first son took his place was doing?

A. I got Mr. Peterson there because Mr. Popescue didn't understand it, and I paid Mr. Popescue five hundred dollars to look after the plumbing and Mr. Peterson six hundred fifty dollars, which

(Testimony of Cash Cole.)

amounts to \$1,150. Mr. Popescue did not know how to operate the electronic [80] control board.

Q. And so you had Mr. Popescue, without knowing how to operate it, at \$650, and Mr. Peterson at how much?

A. Mr. Popescue at five hundred dollars and Mr. Peterson at six hundred fifty dollars.

Q. And did Mr. Peterson get a free apartment, too?

A. No, he didn't live there.

Q. Oh, where did he live?

A. He has a home in town.

Q. So he didn't need an apartment; is that right?

A. That is right.

Q. If he needed one, he could have had an apartment which he could have there, couldn't he?

A. Yes.

Q. And he did have the use of the pick-up?

A. No, he had his own car that he went to and from the place in.

Q. And how long did Mr. Peterson work there?

A. Between transportation seasons on the river. It was just an accommodation.

Q. Just an accommodation for Mr. Peterson? [81]

A. No, for Fairview Manor. We couldn't find anybody in town that could solve the intricacies of those electronic boards.

Q. Mr. Peterson worked on the river, and when he was off work on the river you hired him to work at Fairview Manor?

A. We hired him that winter. He came in

(Testimony of Cash Cole.)

November and stayed until March, when they began to repair their boats for the river work.

Q. What year was that? A. 1951.

Q. You say he came in March?

A. He left in March.

Q. He came when? A. About November.

Q. Would that be the first year that you were operating?

A. Yes, that would be 1951 and into 1952.

Mr. Jaureguy: Could I interrupt to advise the Court and counsel that the books are here?

Mr. Diamond: Thank you, Mr. Jaureguy.

Q. (By Mr. Diamond): Now that the books are here, will you tell me the amount of money that Fairview paid for the parts for your son's [82] truck?

A. You will have to ask the auditor.

Q. You look into the books and get the figure for me. A. You what?

Q. You can find the figure. You are familiar with the books and records.

A. He is familiar with the books and records. I don't keep the books.

Q. The books and records are kept under your supervision? A. No.

Q. Whose supervision? A. Mr. Lofquist.

Q. Oh, now, Mr. Lofquist was fired by you almost a year ago?

A. Those are the books that Mr. Lofquist left.

Q. Yes. A. I never kept the books.

(Testimony of Cash Cole.)

Q. After he left, who was responsible for the books? A. Mrs. Scott.

Q. You don't know anything about the books?

A. Oh, in a general way.

Q. You don't know where the account is with reference to the automotive repairs? [83]

A. Unless you know the key to the books, why, it is a complicated thing to find them. Each account has a number and under different headings.

Q. Well, Mr. Cole, you may ask your accountant to show you where to find the information, but when you see it you are familiar with it, and I would like to have you tell us, as you said you could, when the books were here, the amount of money and the time that was incurred and paid by Fairview for the repairs to your son's automobile or truck. Would you do that, please?

A. If you want, Mr. Vine will give you the information. I have told you that I don't keep the books. I don't know the key to the bookkeeping system and if you want the questions answered readily he can do it for you.

Mr. Diamond: If the Court please, I would like to have Mr. Cole answer the question with reference to the amounts and I think he can talk to his accountant if he likes and tell us what the figure is.

The Court: Yes. We will excuse you from the stand for a moment to go over to your auditor, tell him what you want, and when you get it, bring it back to the stand.

The Witness: Your question again? [84]

(Testimony of Cash Cole.)

Mr. Jaureguy: The Court was instructing you what to do.

The Court: That was the end of the instruction.

The Witness: And you want the amount?

Mr. Diamond: Find the account with reference to your son's truck.

(The witness went over to look at the records.)

Q. (By Mr. Diamond): Mr. Cole, if you will tell us what book you are looking at now and what the item is, and tell us about it.

A. The general ledger, and it is "Other Accounts Receivable."

Q. And what does it show?

A. It shows that there was a charge of seventy-five dollars and a credit of \$144.31; he overpaid the bill \$69.31.

Q. What date did he pay the bill?

A. 8/31.

Q. August 31?

A. 7/31. That auditor's adjustment was 8/31.

Q. Are these records which Mr. Vine made up?

A. No, I think these are Mrs. Scott's.

Q. Mr. Cole, the only thing that is shown there is an auditor's adjustment. There isn't anything to show [85] any obligation from your son, Tom Cole, is there?

A. That is what the bookkeeper gave to me.

Q. Does his name appear any place on that ledger page?

(Testimony of Cash Cole.)

A. It appears some other place, and this is the key number you look up. That is what I explained to you.

Q. Where is the charge as an expense item to Fairview Development with reference to the parts purchased for that truck?

A. I will ask the bookkeeper to point that out and find that.

The Court: Yes.

Mr. Diamond: Mr. Vine, can you step forward and show him that account?

(Mr. Vine came forward to examine the records.)

Mr. Diamond: If your Honor please, I am advised that the information we are asking about is not here; that the detailed information is still in the office, but that Mr. Cole, through his accountant, will have it in the morning here for us.

The Court: Very well.

Mr. Jaureguy: I would like to, if I might, correct that statement. Mr. Vine, as you stated to the Court, is the accountant for the Fairview Development Company and not Mr. Cole's personal accountant. [86]

Mr. Diamond (To the witness): You may sit down.

Q. (By Mr. Diamond): Perhaps we better straighten out: who managed Mr. Vine?

A. I did.

Q. Did the board of directors employ Mr. Vine?

A. No.

(Testimony of Cash Cole.)

Q. Who fixed his compensation?

A. He does.

Q. You don't have any arrangement as to how much he is to be paid?

A. He just makes a minimum charge for his work.

Q. Do you know how much it is going to be?

A. A set charge. No, I don't know what it will total.

Q. Did the board of directors authorize you to employ an accountant?

A. I talked with Mr. Nowell about it.

Q. Did you have any directors' meeting that authorized the employment of an accountant?

A. No.

Q. Isn't Mr. Vine Mr. Rushlight's [87] accountant?

A. No.

Q. Do you know that?

A. I know he doesn't work for Mr. Rushlight.

Q. Does he do accounting work for Mr. Rushlight?

A. He might do accounting work for one of Mr. Rushlight's firm.

Q. Which one? A. L. B. McKinney.

Q. Oh, you do know that?

Does he also do accounting for a firm that you are interested in with Mr. Rushlight?

A. What do you refer to?

Q. You tell me.

A. I don't know of any other work he does for Mr. Rushlight outside of L. B. McKinney.

Q. Does he do any other work for you?

(Testimony of Cash Cole.)

A. No.

Q. Does he do any work for Mooreland Construction Company or Mooreland or whatever its name is?

A. I don't know.

Q. Aren't you connected with Mooreland?

A. Not in a sense. They might have somebody working for them that I don't know about. They have got men out there working and I don't know who they are or what they do. [88]

Q. Where did you meet Mr. Vine?

A. I met him here.

Q. Did Mr. Rushlight introduce you to him?

A. No, I met him through Mr. McKinney.

Q. And Mr. McKinney is associated with Mr. Rushlight?

A. That is right.

Q. And Mr. Rushlight is associated with the L. P. McKinney Company?

A. I think that is right.

Q. You don't know how much it is going to cost the corporation to have Mr. Vine working on their books?

A. I don't know how long it will take.

Q. What is he doing?

A. Making an audit.

Q. Dating back to where?

A. I couldn't tell you. He hasn't decided just where his audit will finish.

Q. Is he going back over Mr. Lofquist's work?

A. He is working it backwards from the date

(Testimony of Cash Cole.)

of the shortage that was discovered back over the records.

Q. Do you know whether you are getting into an expense of hundreds of thousands of dollars with Mr. Vine? [89]

A. I know that it is just what an accountant—we have paid two bills to him for the time up to date. One was, I think, in the neighborhood of seven hundred dollars or eight hundred dollars for the work to date.

Q. Did you fire Mr. Lofquest? A. No.

Q. Is he still working for the corporation?

A. No.

Q. Who terminated his employment?

A. I did.

Q. Did the board of directors authorize your terminating his employment?

A. They didn't have to. There was no money to pay him with.

Q. Mr. Lofquist notified you that you didn't have to have any money, that he would carry on until he could be taken care of?

A. Mr. Lofquist is in Seattle.

Q. That is right, and notified you by correspondence to that effect?

A. He said he would do whatever work was necessary to carry on down there.

Q. And not to worry about the compensation?

A. That is right.

(Testimony of Cash Cole.)

Q. But you had no money so you employed [90] Mr. Vine instead?

A. When an emergency arose here, I employed Mr. Vine.

Q. Outside of Mr. Laumeester and Mr. Peterson, your two sons, one daughter-in-law, and you say maybe your other daughter-in-law, you don't know, and your wife, were any other relatives working for Fairview? A. No.

Q. Do you have any other relatives?

A. Yes.

Q. Now, is Mr. Nowell on the payroll at the present time?

A. He is not receiving any pay.

Q. Does the corporation owe him money for his services?

A. I would say that he had money coming.

Q. At one thousand dollars a month?

A. Whatever can be paid.

Q. It isn't a matter of what can be paid. It is what is owed, Mr. Cole. What does the corporation owe him, the same \$1,000 a month?

A. I would say Mr. Nowell is entitled to \$1,000 a month. [91]

Q. Back for the month of December, 1952, that he wasn't paid?

A. At the time he received his last pay check.

Q. And down to the present time?

A. Down to the present time.

Q. And on into the future at \$1,000 a month?

(Testimony of Cash Cole.)

A. That is right.

Q. It doesn't show on the books and records as an obligation of the corporation, does it, Mr. Cole?

A. I don't understand what you mean.

Q. I mean that the books and records of the corporation do not show an obligation to Mr. Nowell of \$1,000 a month since December 1, 1952?

A. I don't know whether it is set up as an account payable or not.

Q. You are just setting up all of the books new and you are spending money to have it done, or did you tell your auditor what to do with reference to that item?

A. That question hasn't come up yet. He has been busy with checking.

Q. You have just today handed us a statement for eight months of operation.

Which eight months would that be? You have got one beside you in the envelope. [92]

A. Yes, it is up to the thirtieth of August.

Q. Of what year? A. Of this year.

Q. Of this year? A. Yes.

Q. Does that statement show that there is an obligation to Everett Nowell of \$1,000 a month up to the thirtieth of August of this year?

A. I don't think it does.

Q. Take a look at it, Mr. Cole, and tell me.

A. I won't have to look at it. I am telling you I don't think it does.

Q. It doesn't? If you know it doesn't, why doesn't it?

(Testimony of Cash Cole.)

A. I can't tell you that, sir.

Q. It is an obligation of the corporation?

A. I feel it is.

Q. Mr. Cole, you signed an affidavit in connection with this which is on record in the files here. You remember that, don't you? A. Yes.

Q. Let me read you from a copy of that affidavit:

"Everett Nowell received a salary from the time said project opened for occupancy up until January 1, 1953. At that time [93] drastic economies were necessary, so Everett Nowell took himself off the payroll. Up to that time he spent much time in the management of the project."

Is that correct?

A. That is my statement, is it?

Q. Is it correct? A. That is correct.

Q. Up to that time he spent much time in the management of the project. What has he been doing since that time?

A. Isn't he participating in the management of the project?

Q. Is he still spending much time in the management of the project?

A. Yes, I would say that he was.

Q. Why did you say that up until the time he was taken off the payroll he spent much time? Why did you use that language then?

A. Well, that is just up until that time, but

(Testimony of Cash Cole.)

he still is spending time in the management of the project.

Q. Just tell us what Mr. Nowell does. Let's start backwards, like your accountant. [94]

What has he done this last eight months in the management of the project? Just tell us.

A. Our biggest job in the last eight months has been trying to keep this project from going bankrupt due to the loss of some 100 families in the month of—just a little previous to December.

Q. Ninety, I believe, Mr. Cole.

A. I think probably ninety.

Q. It sounds better, one hundred.

A. It would come up—that moved up and down a sliding scale from there, and we were not filled up again until along about April.

Q. Just tell me now what Mr. Nowell is doing in management or working for the project, what time he spent, number of hours, and when.

A. The most of our time was spent on lawsuits.

Q. Just talk about Mr. Nowell's time. Most of his time was spent on lawsuits?

A. Most of his time, too.

Q. What does he do in connection with the lawsuits?

A. Consult with the attorneys continuously. We have spent months trying to get a settlement on this project. [95]

Q. Mr. Cole, haven't you frequently said to parties connected with the project that Mr. Nowell

(Testimony of Cash Cole.)

did not do anything to earn the money he was paid?

Did you ever make that statement? A. No.

Q. You didn't? Is it true? A. No.

Q. Well, what else does he do besides consult with the lawyers?

A. Well, we went to the banks in Seattle to try to raise the money that was needed.

Q. When did you go to the banks?

A. We went to the banks I think it was in January of this year.

Q. How many days did you spend at the bank?

A. We spent about a month in Seattle trying to raise the money from different sources.

Q. What else did you do?

A. Whatever problems may arise about changes in the project.

Q. How much time? I am only talking about the last eight months now. How much time during that period did Mr. Nowell spend in Fairbanks?

A. I couldn't tell you.

Q. Oh, yes, you can. At times you have been [96] here. Approximately how long has he been here?

A. He has been here off and on continuously.

Q. And how long would he be here at a time when he was here?

A. Maybe a week at a time.

Q. And how many times would you say he was here over the past eight months?

A. I couldn't say with any degree of accuracy.

(Testimony of Cash Cole.)

Q. Two or three times?

A. Oh, many times a month, that I think.

Q. Mr. Cole, you remember your deposition being taken by Mr. Sczudlo here a few days ago?

A. Yes.

Q. You answered some questions there. Do you remember saying there that all Mr. Nowell did was consult with you when you wanted to talk to him? Do you remember that?

A. That is right.

Q. Is that correct? A. That is correct.

Q. Did he ever handle any of the rents?

A. Not since it opened.

Q. Did he ever do anything about employing any people? [97]

A. Yes.

Q. He did? Who? A. Mr. Popescue.

Q. When you were away for five months he came up here and stayed two days hiring Mr. Popescue, who was already working for the project; isn't that right?

A. That is right.

Q. Changed his status from maintenance man to supervisor and raised his pay to eight hundred dollars and put him in charge of supervision; isn't that right?

A. Well, not in supervision of the office.

Q. That is right, everything except the office. You wouldn't let him touch the office. What else did Mr. Nowell do?

A. That would about sum it up.

Q. He didn't keep any of the books?

A. No.

Q. He didn't know anything about the books, did he?

(Testimony of Cash Cole.)

A. Do you mean, is he a bookkeeper?

Q. I mean does he know anything about the books of Fairview Development Company?

A. He knows, well, he has gone in, whenever he has been here, and taken a look at the books. [98]

Q. Does he know more about them than you do?

A. I imagine so.

Q. He has an apartment? A. Yes.

Q. And you so testified in your deposition, that he has a free apartment, didn't you? A. Yes.

Q. He spends practically no time in it, does he?

A. Not here steadily.

Q. Mr. Nowell is full time employed by the Alaska Freight Lines, isn't he?

A. I couldn't tell you.

Q. Oh, Mr. Cole, you know that?

A. I know he works for the Alaska Freight Lines.

Q. You know he worked for them for many years, don't you? A. Off and on.

Q. What is there about it that you don't know?

A. You just said steady employment. I know he is working for them at present. I don't know how steady it is.

Q. Hasn't he worked for them all the time he has been interested in Fairview? [99]

A. I wouldn't say.

Q. Who built the bar in Mr. Nowell's apartment?

A. I didn't know there was a bar in Mr. Nowell's apartment.

(Testimony of Cash Cole.)

Q. Did I hear you right?

A. I would call it a counter in place of a table. He simply has a counter there that he uses to sit where he eats.

Q. Let me understand you, Mr. Cole. You don't know that there is a liquor bar in the apartment of Everett Nowell and all you know is there is a counter fixed so that he can sit and eat there?

A. Just the same as you had in a restaurant.

Q. Mr. Cole, there has been plenty of discussion about the bar and the running of water in a sink in connection with it in that apartment over many months, hasn't there?

A. The running of water in a sink?

Q. Yes.

A. I have never heard any discussion about running water in a sink.

Q. You have heard discussion about the bar in Mr. Nowell's apartment on many occasions, haven't you? [100]

(Pause.)

Q. Can you answer that question?

A. No, I haven't heard it discussed on many occasions.

Q. As far as you are concerned, there isn't any bar in that apartment?

A. You might want to call it a bar—any more than that thing you put your books on. It is simply a counter.

Q. Made and built for the serving of liquor and entertaining guests; is that right?

(Testimony of Cash Cole.)

A. I suppose if somebody sat up there to eat they would be entertained or if they had a drink they would be entertained. Do you mean he sells liquor, or something?

Q. Was that apartment furnished, Mr. Nowell's apartment? A. Yes.

Q. Who paid for the furniture?

A. Fairview Manor.

Q. Incidentally, who paid for this counter to eat at in Mr. Nowell's apartment?

A. Fairview Manor.

Q. How much? [101]

A. I couldn't tell you.

Q. Does \$450 sound right?

A. I think the record will show.

Q. You remember hearing a figure about like that?

A. I have heard it discussed. I never did check it.

Q. You don't remember whether that is approximately right?

A. I think I have heard that figure.

Q. What kind of furniture was put in that apartment?

A. Well, there is a hide-a-bed and twin beds.

Q. What else?

A. Dresser, a few chairs, and a lamp.

Q. Who selected it?

A. I guess Mr. Nowell.

Q. And Fairview Manor paid for it?

A. Fairview paid for it.

Q. How much did it cost?

(Testimony of Cash Cole.)

A. About \$2,500.

Q. Isn't it closer to about \$3,100?

A. No, I think about \$2,500 would cover it.

Q. Can you determine this evening what the cost of that is? [102]

A. Yes.

Q. And also the furniture in your own place?

A. The two of them amount to about five thousand dollars.

Q. Well, yours amounts to about \$4,100, does it not?

A. No, it is about \$2,500, about the same as Mr. Nowell's.

Q. Will you bring the file down with reference to that item and have it here in the morning?

A. Yes.

Q. We want the specific bills as to type of furniture, and so on. What you purchased, Mr. Cole, was linens, bedding, dishes, silverware for your own apartment, didn't you?

A. Yes.

Q. All charged to Fairview?

A. That is right.

Q. Did the board of directors approve that?

A. Well, when we discussed the management contract, where we had the meeting about the management contract, the apartments were included, five per cent and one thousand dollar guarantee and an apartment.

Q. That is the meeting where and when?

A. That was the meeting at the airport with the [103] board of directors.

Q. Well, we will talk about that a little later.

(Testimony of Cash Cole.)

The other apartments in the Fairview Manor are unfurnished, aren't they? A. Yes.

Q. What size apartment do you have, Mr. Cole?
What size did you have at the start?

A. Two-bedroom.

Q. And what does that rent for? A. \$165.

Q. Unfurnished? A. Unfurnished.

Q. And at the present time, what do you have?

A. We have an additional apartment added to that with an opening of an efficiency.

Q. When did you take over the additional apartment, Mr. Cole? A. In December.

Q. Last year?

The board of directors know about it and approve it? A. No.

Q. Did Mr. Mortensen or any of them know about it and approve it? [104]

A. No, they didn't have to approve it.

Q. You had to cut a hole in the wall?

A. I cut a hole in the wall.

Q. Who paid for that? A. Fairview.

Q. Who did that work?

A. The maintenance man we have.

Q. You had to take out the kitchen?

A. Take out the kitchen.

Q. Did the board of directors approve of that?

A. No.

Q. Did Mr. Nowell know about that?

A. Yes.

Q. Did he get another apartment, too?

A. No.

(Testimony of Cash Cole.)

Q. Can he have one if he wants one?

A. He hasn't asked for one. The reason for doing that, we had had many requests for more than two bedrooms and we had had a number of people ask if we could cut through the wall so they could have larger apartments, and when we lost the 100 people we had some people from town come out and inquire about a place, and we cut the place through then as a show place.

Q. Did you furnish the rest of the new apartment you took over? [105]

A. No, just about the same furniture spread out.

Q. Did you buy any more furniture?

A. There might have been a few small things purchased.

Q. Who paid for those? A. Fairview.

Q. Do you have a car of your own, Mr. Cole?

A. No.

Q. When you want to go out for your own entertainment or your own use, you use a Fairview car?

A. I ride in a pick-up.

Q. A Fairview car, or pick-up? A. Yes.

Q. And your apartment and your furniture is all paid for by Fairview? A. Fairview.

Q. Does Fairview pay for the food?

A. No.

Q. Now, what does the efficiency apartment that you added to your apartment rent for?

A. \$125.

Q. The apartment together with that you now occupy would rent for \$290 a month, wouldn't it?

(Testimony of Cash Cole.)

A. Yes. [106]

The Court: I think this would be a good time for a recess.

Mr. Diamond: Thank you.

The Court: Ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Are you ready to proceed?

Mr. Diamond: Yes, your Honor.

If your Honor please, with reference to the matter of these books, I understand Mr. Vine would like to get away, and I have no desire to detain him for this evening, but we have an accountant that has been trying to take a look at the books, too, and now we have got some here and some out there. I am sure that the witnesses are going to require the books here in the courtroom. I would like to suggest that the books be made available in the courtroom and subject to both sides seeing them here or in the jury room, perhaps, so that they would be accessible and available without any undue delay or without keeping Mr. Vine or anyone else around when they wouldn't want to be.

I think that is a feasible suggestion and I would like to suggest that the books be brought here on that basis and available. [107]

The Court: So ordered.

Mr. Jaureguy: No, objection from our standpoint, I am sure, your Honor.

The Court: I beg your pardon?

(Testimony of Cash Cole.)

Mr. Jaureguy: I say there is no objection from our standpoint. We brought over so far what he wanted.

The Court: Very well.

Mr. Diamond: May I inquire, would the jury room possibly be open in the evening where the accountant could look at the books and work on them or not?

The Court: Not very well. However, would you have him there at night? Would you want him to use them?

Mr. Diamond: Yes, I would. Perhaps early in the morning, too, 8:00 o'clock or so.

The Court: I doubt if they will be available at that time in the morning, but it is a little difficult to arrange.

Mr. Clerk, do you have any suggestion?

The Clerk: I could give whoever is going to look at them my key, your Honor, to the gate out here, and they could get through and be available if it is all right with both parties and the Court, and I would not take any further responsibility for them. I have a key to that gate I could give to [108] somebody.

Mr. Diamond: It is agreeable to us if it is agreeable with counsel. The only ones I would permit to have access to the books is Mr. Martin. I believe you are a certified public accountant?

Mr. Martin: No, not certified.

Mr. Jaureguy: I wouldn't want to restrict you at all, but I know you wouldn't let anybody in that

(Testimony of Cash Cole.)

wasn't perfectly reliable, so that you are not restricted to him.

Mr. Diamond: Fine.

Mr. Jaureguy: And that you will, of course, cooperate with us to the extent, for instance, if you get suspicious that maybe there is a little risk in it, that you will advise us.

Mr. Diamond: Fine, I will do so.

Mr. Jaureguy: It is just as important for you as it is for us that those books are available and nobody will get away with them.

Mr. Diamond: That is fine. Is there some way this key can be made available to both sides?

The Clerk: I have the one key. If you all can get together and meet, you can have this key.

Mr. Jaureguy: Now you have asked several questions. [109]

Mr. Diamond: Do you have any objection to my taking the key and if you want it you can holler?

Mr. Jaureguy: All right.

Mr. Diamond: When can we have the books down here? They are not all down here. And the records.

Mr. Jaureguy: I think the accountants seem to agree it would be better for us to have the books stay out there and then they can get in the office and see them.

Mr. Diamond: It is agreeable with me, if the accountants desire that. You make arrangements, Mr. Martin, then, to get access to what you want.

Mr. Martin: Fine.

(Testimony of Cash Cole.)

Mr. Diamond: All right, we will do it that way. I am sorry.

Q. (By Mr. Diamond): Now, Mr. Cole, you are familiar with the income tax return made for the year ending December 31, 1952?

A. Yes, there was one made.

Q. And you signed it, I believe, and sent it in, didn't you?

A. I don't remember whether I signed or Mr. Nowell signed. [110]

Q. You know, do you not, that it showed the salaries paid to you and Mr. Nowell as \$23,000, \$1,000 short of each of you getting \$1,000 a month, you know that, don't you? A. No.

Q. You know that Mr. Nowell was not paid \$1,000 for the month of December?

A. You mean for 1952?

Q. Yes, that is right. A. That is right.

Q. And you know there were salaries then of \$23,000 for the two of you and not \$24,000?

A. Yes.

Q. The \$24,000 was due. Your testimony now is that the corporation owes Mr. Nowell the other one thousand dollars; is that right?

A. I would say so.

Q. And the tax return would be wrong, wouldn't it?

A. Unless you want to carry it over into next year. If it wasn't paid they couldn't collect any withholding or any social security and it would be treated as of the year it was paid in.

(Testimony of Cash Cole.)

Q. As far as the corporation is concerned, it is on an accrual basis, so that it would be a [111] proper expense and should be in the income tax return of the corporation as an expense?

A. That must have been Mr. Lofquist's judgment on it, that he saw free to treat it that way.

Q. Mr. Cole, didn't you write a letter down to Mr. Lofquist and tell him that as of December 1, Mr. Nowell was off the payroll?

A. I told him he wasn't being paid.

Q. Isn't that the reason it was left off?

A. I don't know.

Q. As a matter of fact, Mr. Cole, you and Mr. Nowell were having quite a feud over the matter of Mr. Nowell being taken off the payroll, weren't you?

A. No, we didn't have any feud.

Q. Did you have any words over it?

A. Mr. Nowell wondered why he didn't get his pay.

Q. And there was some difficulty between the two of you, wasn't there, over it?

A. No, there just was no money.

Q. Isn't it true that in order not to lose his support in connection with this lawsuit and other lawsuits you agree to pay him now for the back wages at one thousand dollars a month? [112]

A. There is no different attitude on my part than there ever was. Mr. Nowell agreed in the management the same as I did whether I did all the work and we shared it or both worked together in it.

Q. Did you do all the work?

(Testimony of Cash Cole.)

A. No, but I say whether I did do all the work.

Q. Did Mr. Nowell do an equal amount of work?

A. No, he wasn't here all the time.

Q. Did he do less work than you did?

A. I think we have gone into that.

Q. Just answer that. A. Yes.

Q. He did less work than you did?

A. Yes.

Q. Was he overpaid or were you underpaid?

A. There was never any argument about that. It was based on the original agreement of one thousand dollars apiece.

Q. Did the corporation receive the value of one thousand dollars worth of work from Mr. Nowell?

A. From Mr. Nowell and Cole together.

Q. No, Mr. Nowell received \$1,000 a month, and as manager of the corporation, I am asking if the corporation received value for its money? [113]

A. I would say that we held the contract jointly and that jointly it rendered that much service.

Q. You won't answer my question?

A. Whether I did the most of the work or not?

Q. Can you answer the question I asked you as to whether Mr. Nowell rendered \$1,000 worth of service to the corporation?

A. In consideration of the agreement he did.

Q. When you took him off the salary, why didn't you cut yourself off to reduce it? You were short of money.

A. There was a serious question of whether I would or not for a while.

(Testimony of Cash Cole.)

Q. That was what Mr. Nowell wanted you to do, was it not?

A. Yes—no—I say, “Yes.” He never said anything about me being off the salary. I was here and working and there was never any discussion along that line.

Q. As long as Mr. Nowell receives the same compensation as you do then he is on your side in this difficulty that has been going on with Mortensen, isn't he?

A. I think Mr. Nowell looks at it from a wrong and a right point of view. It isn't a matter [114] of buying Mr. Nowell's support, as you intimate. Mr. Nowell has his own mind and makes up his own mind and has his own judgment about this thing, and if he thinks it is fair and just, I feel positive he will stand on the side he picks and it won't be a matter of me paying him or me not paying him, as you intimate.

Q. Now, the records which you have for the eight months do not show an obligation by the corporation to Nowell for \$1,000 a month; that is right, isn't it?

A. I haven't had an opportunity to go over it closely.

Q. You told me you didn't have to look at it, you knew. A. Yes.

Q. Why was it left out?

A. I don't know.

Q. You are going to have to redo it all now. aren't you, to put it back in? A. No.

(Testimony of Cash Cole.)

Q. What are you going to do?

A. I don't know how it will be handled.

Q. So that we understand each other, it will reduce the profit or else will increase the loss to Fairview when you put it back in where it belongs?

A. Yes, it will be an expense. [115]

Q. In 1952, besides the \$23,000 paid to you and Mr. Nowell for management, and really it should have been \$24,000, you paid Mr. Popescue \$2,700 for management, too, didn't you?

A. Yes. I don't know what it adds up to, but the number of months he worked there.

Q. And you also paid Mr. Robert Sheldon \$543.92 for management?

A. For what?

Q. For management.

A. Well, if you would call it that. He was doing all types of work.

Q. It was charged to the management account in 1952 and somebody just recently now requested that it be taken out by Mr. Vine and charged some place else?

A. That would be right.

Q. Did you tell them to do that?

A. It wasn't management.

Q. Did you tell Mr. Vine to do that?

A. No, I think in the distribution of that that was made up, Mrs. Scott was working on an analysis that would show more distribution. The books as originally set up did not distribute the labor. For instance, it shows for the twenty-three—twenty-five months of operation that the janitorial services were \$103,000. If you hired a carpenter out

(Testimony of Cash Cole.)

there or [116] a fireman, when he was paid he would be placed over in the janitor column, which is not the true situation.

Mr. Diamond: May I have this marked as an exhibit?

The Clerk: Plaintiff's Identification No. 1 and Plaintiff's Identification No. 2. 1951 is Plaintiff's Identification No. 1 and 1952 is Plaintiff's Identification No. 2.

(The 1951 income tax return was marked Plaintiff's Identification No. 1. The 1952 income tax return was marked Plaintiff's Identification No. 2.)

Q. (By Mr. Diamond): Now, Mr. Cole, you mentioned Mrs. Scott. She was the bookkeeper working on the books at Fairview Manor?

A. Yes.

Q. And she was working under you?

A. No, she worked under Mr. Lofquist.

Q. Who did she take orders from?

A. Mr. Lofquist. She kept the books absolutely as he set them up and made no changes in entries unless he told her so. According to your letter that you wrote to Lofquist the whole situation about the money was set up by you. You said that Lofquist would have to be the [117] man that would have charge. He would check the cashier, place her under bond and institute the books, and, therefore, she was the one that was placed under bond, and when you asked me for a bond, I never handled any money at

(Testimony of Cash Cole.)

Fairview. Nobody but Mrs. Scott ever handled any money there or nobody but Mrs. Scott ever handled the books with the exception that Mrs. Cole was there during her vacation. There were never any changes made, at my instructions, as to how the books should be kept until here in the last thirty days.

Q. So the entries as made by Mrs. Scott were made as she thought they ought to be made?

A. As Mr. Lofquist pointed out.

Q. Now, Mr. Cole, handing you what has been marked Plaintiff's Exhibit A for identification, I ask you if you can tell me what that is? I might also tell you that it is an income tax return copy that I obtained from your lawyer Saturday. Can you answer the question?

A. What was your question?

Q. I asked you if you can identify Plaintiff's Exhibit 1 for identification, and tell us what it is.

A. I thought you answered the question. You said it is an income tax return. That is what it [118] says on the head of it, and I will agree with you, that is what it looks like.

Q. Will you agree it is the income tax return for the year 1951 for Fairview Development Corporation?

A. That is right.

Q. Will you agree that it was prepared by the accountants and sent in by the accountants and you for the company?

A. This is a copy that Mr. Lofquist sent from Seattle for our office record.

(Testimony of Cash Cole.)

Mr. Diamond: I will offer Exhibit 1 in evidence.

Mr. Jaureguy: We have no objection, although we may at some time wish to substitute a photo-static copy.

Mr. Diamond: I have no objection to that, if you wish to do so.

The Court: Very well. It may be admitted.

The Clerk: Plaintiff's Exhibit A.

(The income tax return for 1951, previously marked Plaintiff's Identification No. 1, was received in evidence as Plaintiff's Exhibit A.)

Q. (By Mr. Diamond): Handing you Plaintiff's Exhibit 2 for Identification, I will ask you if you can tell us what that is? [119]

A. United States corporate income tax, 1952, Fairview Development, Incorporated.

Q. Do you recognize it? A. Yes.

Q. As something you had in your possession and from your records?

A. I think I gave it to Mr. Sczudlo.

Mr. Diamond: I will offer it as Exhibit 2 in evidence.

Mr. Jaureguy: No objection.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit B.

(The income tax return for 1952, previously marked Plaintiff's Identification No. 2, was received in evidence as Plaintiff's Exhibit B.)

Q. (By Mr. Diamond): Mr. Cole, the two

(Testimony of Cash Cole.)

apartments which you now occupy, you occupy those free of rent, don't you? A. Yes.

Q. And you don't pay anything for the use of the furniture which belongs to the corporation?

A. No.

Q. Does the corporation have an inventory in its records of the furniture in your apartment? [120]

A. Yes.

Q. Who has that?

A. It is in the files at Fairview Manor.

Q. Can you bring that down with you tomorrow? A. Do you want the——

Q. And also the inventory of Mr. Nowell's?

A. Yes.

Q. Who pays the utilities for your apartment?

A. Fairview Manor.

Q. And the utilities include what?

A. Electricity.

Q. Heat, light, water, and telephone?

A. Telephone.

The Court: How was that? Only telephone?

The Witness: Pardon?

The Court: Does it only include the telephone?

The Witness: It includes the telephone and the electricity.

The Court: And the heat?

The Witness: The heat is furnished to everybody.

The Court: And the **water**?

The Witness: And the water is furnished with it.

The Court: Very well. [121]

(Testimony of Cash Cole.)

Q. (By Mr. Diamond): You don't personally pay for any utilities? A. No.

Q. The other apartments which are rented out, do the tenants pay for their electricity?

A. Yes.

Q. And they also pay for their telephone, if they have it? A. For telephone.

Q. They get water free?

A. Water, heat, stove and refrigerator.

Q. The use of a stove and refrigerator, but they pay for the electricity?

A. They pay for the electricity.

Mr. Diamond: Mr. Clerk, will you mark this as an exhibit, please?

The Clerk: Plaintiff's Identification No. 3.

(Photostatic copy of letter from Mr. Cole to Mr. Lofquist was marked Plaintiff's Identification No. 3.)

Q. (By Mr. Diamond): Mr. Cole, handing you Plaintiff's Exhibit 3 for identification, I will ask you if you can identify your signature on this photostatic copy of a letter? A. Yes. [122]

Q. And that is a photostatic copy of a letter that you wrote to whom? A. Lofquist.

Q. The accountant.

I will offer Plaintiff's Exhibit 3 for identification in evidence.

Mr. Jaureguy: There will be no objection.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit C.

(Testimony of Cash Cole.)

(The photostatic copy of letter from Mr. Cole to Mr. Lofquist, previously marked Plaintiff's Identification No. 3, was received in evidence as Plaintiff's Exhibit C.)

Q. (By Mr. Diamond): Mr. Cole, I believe you stated—I am not sure—that the Fairview Manor was 100 per cent occupied at the present time?

A. No, not at present. There is some moving out.

Q. Normal turn-over? A. Yes.

Q. It is for the most part running about 100 per cent full, isn't it?

A. It has been pretty well filled up since about May. [123]

Q. That is when you had the trouble over the ninety that went out?

A. Well, from December up to May.

Q. Do you feel, Mr. Cole, that there is still an excessive demand for apartments, living quarters, in the City of Fairbanks? A. Yes.

Q. Now, you are presently engaged in constructing a new housing project?

A. I have an interest in it.

Q. What kind of interest and where is it located?

A. It is right across from Fairview Manor.

Q. Right across the street? A. Yes.

Q. Directly. And how large a project is it?

A. Two hundred units.

Q. Compared to Fairview having how many?

A. 272.

Q. And what kind of units are they going to be?

(Testimony of Cash Cole.)

A. One bedroom, two bedrooms, and three bedrooms.

Q. Is that what you have in Fairview?

A. No, you just have efficiencies, one bedrooms, two bedrooms, and there is a big demand for larger units for large families. [124]

Q. You say you are associated or connected with that project. Who else is connected with it?

A. Mr. Rushlight.

Q. You went in it as a joint venture?

A. Yes.

Q. Is the construction under way?

A. Yes.

Q. What is your official position with the project?

A. I am just the president of the corporation.

Q. That owns it? A. That owns it.

Q. You are managing it?

A. That hasn't been settled.

Q. As president of the corporation, you anticipate you will manage it?

A. I don't know. I haven't decided.

Q. Do you feel, Mr. Cole, that you could manage two projects, one on one side of the road owned by different people?

A. Yes. With all the shortcomings that we have found at Fairview Manor we can remedy in Mooreland Court and it will be much easier to manage from an operational standpoint. [125]

Q. You can easily move the tenants from Fairview Manor to Mooreland?

(Testimony of Cash Cole.)

A. It will be much cheaper.

Q. And I say, you can move the tenants from Fairview over to Mooreland Court?

A. A tenant usually makes his own choice.

Q. Dependent on the rental charged by management?

A. And what you have to offer and, I think, Fairview Manor today is looked upon as as good a place as there is in Fairbanks or probably better, and the water at Fairview Manor is better than any other place.

Q. Mr. Cole, you know that there is a lawsuit brought by Mr. Rushlight or his company against Fairview Development Corporation?

A. I don't think you state it correctly. The lawsuit is against the contractor and not against Fairview. We had no contract with Mr. Rushlight, Fairview Manor.

Q. Mr. Cole, don't you know that the lawsuit is a lien foreclosure against Fairview Corporation as defendant?

A. That is correct, and I might say that you, as representing the contractor, permitted that lien to be placed on there and kept on there, while you took all the money left in Fairview Manor's treasury and put it up for security for the contractor. The contractor, [126] in order to secure the title for the Kansas City Title and Trust, and that has been very much to the detriment of Fairview Manor, because we ran out of money here this winter. We could not borrow a nickel from any bank and it

(Testimony of Cash Cole.)

was because of the lien that was on Fairview Manor, although we had given every dollar that we agreed to for the construction of that place.

Mr. Diamond: That is a long answer and is not responsive to anything, and I think if we would try to straighten it out it would take the rest of the evening, so I better move it be stricken as not responsive.

The Court: It may be stricken.

Q. (By Mr. Diamond): You say you do know that there was a lawsuit brought by Rushlight against the rest of the Fairview Development Company?

A. I know there is a lawsuit against Mr. Nelse Mortensen and Mr. Rushlight has a lien on Fairview Manor.

Q. You don't know he is suing to foreclose that lien and take over the **property**?

A. That may be so, if the contractor can't pay the bill.

Q. As manager of the apartment house and secretary-treasurer of the corporation, what have you done [127] to look after the defense of that lawsuit, Mr. Cole?

A. Mr. Nowell and I have tried at various and sundry times to get a settlement. We tried to get the money, the \$311,000, when it came to Fairview Manor to be left in their hands and we attempted to call the parties together and have a board appointed who would decide what was a fair price for settlement.

(Testimony of Cash Cole.)

Q. Have you done anything about hiring or employing any lawyers to defend the corporation in connection with that lawsuit? A. No.

Q. You have been closely associated with Mr. Rushlight all during the time the litigation has been pending between Rushlight and Fairview Development, haven't you? A. We are good friends.

Q. As a matter of fact, you have been furnishing him all the information with reference to the operation by Fairview, haven't you?

A. Oh, nothing that is a secret, nothing that would help him in any way or make any difference in the suit he might have.

Q. Mr. Cole, now, out at Fairview project there is a little building that was used by you as a [128] maintenance shack that was built originally by Nelse Mortensen-Alaska, the construction company, isn't there? A. Yes.

Q. And I believe that you or Fairview Development put some additional siding on it and used it as a maintenance house for the project?

A. I think the contractor left it there as something they used.

Q. Didn't Fairview Development use it as a maintenance house?

A. When that was all we had. It was too small.

Q. Where is that building now?

A. It has been rented to Mooreland Court contractors.

Q. Did the board of directors approve that rental? A. No.

(Testimony of Cash Cole.)

Q. That is renting the Fairview property to yourself, isn't it? A. No.

Q. Who did you rent it to?

A. Mooreland contractors.

Q. That is you and Mr. Rushlight?

A. No. I am not a contractor. [129]

Q. It is Mr. Rushlight, then?

A. It is Rushlight and Associates.

Q. What rental has been arrived at?

A. Seventy-five dollars a month.

Q. Did the Board of Directors approve that transaction? A. No.

Q. Does that appear on the books and records of the corporation? A. It will.

Q. Does it now?

A. It has just been rented.

Q. When? A. Oh, about two weeks ago.

Q. Now that we have this lawsuit, it will appear on the books?

Mr. Jaureguy: Your Honor, I move that question be stricken as improper.

Mr. Diamond: I have no objection. It may be stricken.

Mr. Jaureguy: I don't believe it is pertinent.

The Court: Yes, it may be stricken.

Q. (By Mr. Diamond): Who does that building belong to?

A. I think the contractors have a bill. [130] They are charging us \$4,200 for it. I suppose it belongs to Fairview Manor, whether they like the price or not.

(Testimony of Cash Cole.)

Q. Do you know whether Fairview owns it or not?

A. We have it. We have possession of it and we have been charged \$4,200 for it.

Q. What other property have you rented to Mr. Rushlight or Mr. Rushlight and yourself, whoever is engaged in that project? A. None.

Q. That is the only item?

A. Outside of apartments, that is more rent.

Q. How many apartments have you rented to him?

A. Oh, they have three or four apartments that they have had rented over a period of two years.

Q. Mooreland Construction hasn't been in existence for two years.

A. They simply transfer them. We rented first to Rushlight Macri and then L. P. McKinney and then Mooreland Contractors.

Q. Now, Mr. Cole, in December, 1951, right after Christmas, you went south for a period of five months, I believe you testified December 26th or right after Christmas, 1951, you went south for a period of approximately five months? [131]

A. I would have to check that to be sure.

Q. Well, check what, because it is an approximation?

A. I have been south so many times on this thing I would have to just refresh my memory to tell.

Q. Mr. Cole, in your deposition you were asked these questions and you said you would check your

(Testimony of Cash Cole.)

date book and you would know and you would have that information.

A. Yes (witness opening envelope).

Q. That is the file that only has the accountant's report in it, remember?

A. That was December of 1952?

Q. No. A. 1953?

Q. No, 1951.

A. 1951. I went south in February.

Q. In February? A. February.

Q. Mr. Cole, what are you endeavoring to read from? A. From minutes from a day book.

Q. Your day book, or something you made from your day book?

A. Made from the day book. [132]

Q. Where is the day book?

A. The day book is at my house.

Q. Would you bring that down here tomorrow, that day book, please?

A. There is a lot of other things besides this record.

Q. I would like to see it.

A. A lot of other business that has nothing to do with the case.

Q. You can point out the pages I will be interested in, if you will have your day book, please.

Mr. Jaureguy: If counsel will agreed that he will look at the pages that the witness designates then I think there would be no objection to bringing it, but very often that is just a lead.

Mr. Diamond: Well, I will agree that Mr. Cole

(Testimony of Cash Cole.)

can retain possession of the day book and point out to me the pages that he is referring to.

Mr. Jaureguy: Well, you gave me more than I asked for, so that is all right.

Mr. Diamond: Yes, sir.

Q. (By Mr. Diamond): Besides the memorandum you made from your day book, what else do you have in your file, Mr. Cole? I asked you once before and I got an equivocal [133] answer. What else do you have there? A. The reports.

Q. And what else besides the reports?

A. That is all.

Q. You have a list of the dates that you were down south? A. Yes.

Q. All right. Now, don't you find that you were down south in December of 1951 until about May 27—it might have been May 20, 1952?

A. I was down and back.

Q. Tell us when, then.

A. January (witness refers to papers)—January sixth in Seattle.

Q. You went down?

A. On disposition of the ten per cent money that was retained in the bank that you wanted to get released——

Q. You are wasting a lot of time, Mr. Cole; if you will just answer the question and then you can explain. A. Yes.

Q. On January 6th you went down. Is that the first time after Christmas of 1951 that you went south? A. Yes.

(Testimony of Cash Cole.)

Q. And how long did you stay down there? [134]

A. After January I stayed down until May 24th.

Q. May 24, 1952. That is about 4½ or 5 months——

A. Yes.

Q. ——that you were down south. Who paid your trip down?

A. Fairview Manor.

Q. And who paid your trip back?

A. Fairview Manor.

Q. Where did you stay when you were in Seattle?

A. At the Claremont.

Q. Did your wife go with you?

A. Yes.

Q. She stayed there, too?

A. Yes.

Q. Who paid your expenses at Claremont Manor while you were there?

A. The Claremont?

Q. At the Claremont Hotel.

A. Fairview Manor.

Q. Did that include your wife's expenses, too?

A. We charged so much for a room and eight dollars a day for subsistence. [135]

Q. You charged eight dollars to Fairview for your subsistence?

A. Yes.

Q. Did that go on for five months?

A. For the time I was away.

Q. All that time?

A. All that time.

Q. You told me earlier that you were only down in Seattle on business in connection with the lawsuits; is that right?

A. That is right.

Q. You spent that five months in Seattle in connection with litigation?

A. And discussion with you people.

Q. All that five months in discussion and litigation?

A. Discussion and waiting.

(Testimony of Cash Cole.)

Q. As a matter of fact, in January, 1952, there wasn't any litigation, was there? There weren't any lawsuits then? A. No, it was settlement.

Q. There were discussions, yes——

A. Yes.

Q. ——but not for five months, Mr. Cole, were there? [136]

A. Yes, it went on. We met during that time off and on every month.

Q. Mr. Cole, do you think you saw me during that time more than half a dozen times for an hour at the most on each occasion?

A. I may not have seen you but our lawyers did.

Q. Who were your lawyers at that time?

A. Morrissey and Hedrick.

Q. And during all that time you were drawing \$1,000? A. That is right.

Q. And during the first month of that time your wife drew \$200 a month while she was down there, didn't she?

A. I think the first month of 1952.

Q. Now, during that period of time didn't you go down to California? A. Yes.

Q. How would you confer with me in Seattle if you were in California?

A. There was a period there of about three weeks when Mr. Morrissey and Mr. Henderson were out of town.

Q. You didn't come back to Alaska; you went to California? [137]

A. I went to California.

(Testimony of Cash Cole.)

Q. Who paid your fare down to California?

A. I did.

Q. Fairview didn't pay that? A. No.

Q. But who paid the fare or the bill at Pine Crest, where you stayed?

A. The subsistence, Fairview.

Q. Paid for your hotel and your meals?

A. Paid for the subsistence.

Q. How long were you in California?

A. Oh, about four weeks.

Q. Eight dollars a day and your hotel bill?

A. Yes.

Q. And \$1,000 a month from the Fairview Manor? A. Yes.

Q. Your apartment up here was kept for you and was kept vacant all the time you were gone?

A. Yes.

Q. Did you do any conferring with the lawyers and with me during that time you were in California?

A. No; there was a kind of stalemate for that period.

Q. Mr. Cole, weren't you sick? [138]

A. I wasn't feeling very well.

Q. Didn't you go down there for your health?

A. Well, it was a matter of whether I stayed in Seattle or went to California and the climate was warmer down there and I just went to California.

Q. Weren't you under treatment by doctors down there?

A. I went through a clinic while I was there.

(Testimony of Cash Cole.)

Q. Did you have some kind of an operation?

A. A slight one.

Q. I guess I have to dig everything out, don't I, Mr. Cole? You went down there actually for an operation and because of your health and because you weren't well and not on company business; isn't that right?

A. No; it was just a question of where I waited.

Q. You were so ill when you went down there you weren't even sure you were going to come back; isn't that right?

A. I was pretty well worn out from operating this place from 6:00 in the morning until 12:00 o'clock at night.

Q. And you had to go down there for an [139] operation?

A. I just went down and had a check-up.

Q. And an operation? A. A slight one.

Q. Who paid for the operation? A. I did.

Q. Not Fairview? A. Not Fairview.

Q. When you left here, Mr. Cole, you had Mr. Sheldon as assistant manager and you had Mr. Popescue. Mr. Sheldon at five or six hundred dollars a month as assistant manager or supervisor or whatever you might want to call him. You had your cousin, Mr. Peterson, as an assistant manager or supervisor or whatever you want to call him, doing the work that subsequently you say your sons took over, and you also had Mr. Popescue, all of them receiving somewhere between five and six hundred a month plus an apartment; is that right?

(Testimony of Cash Cole.)

A. You don't state their positions correctly, is all. Those people were working.

Q. And which one of them did you leave in charge when you left? A. Mr. Peterson.

Q. Mr. Peterson, your relative. Did he stay in charge? [140] A. No.

Q. What happened?

A. He went back to work on the river boats, I think, in March.

Q. But in January and February and until he left in March he was there? A. Yes.

Q. But you still had some difficulty that arose and it was necessary to have a manager or someone, a supervisor in charge of the project, was it not?

A. Mr. Peterson was.

Q. During all that time?

A. Yes, up until he left.

Q. In March?

A. Yes, I think it was March he left.

Q. That is when he left, but you do know, do you not, Mr. Cole, that Mr. Popescue was appointed as a supervisor in charge of everything except the office by Mr. Everett Nowell with your permission and request; don't you know that?

A. No; I didn't request him to appoint Mr. Popescue.

Q. You know he did that?

A. He did that. [141]

Q. You know you wrote a letter to him and you know he wrote a letter doing it and telling Mr. Lofquist about it? A. Yes.

(Testimony of Cash Cole.)

Q. And you know he increased his salary from five or six to eight hundred dollars a month?

A. Yes.

Q. Because he was in charge of everything except the office; isn't that right? A. Yes.

Q. And because you were away; isn't that right?

A. He wasn't doing anything I did.

Q. Who was doing the work that you did?

A. He was doing all the mechanical work.

Q. Who was doing the work you would have done if you had been there?

A. It was handled in the office.

Q. By whom? A. Mrs. Scott.

Q. Did you raise her salary?

A. I raised her salary to \$400 a month and an apartment.

Q. Because you were away?

A. No; just because the hall women were getting almost as much as she was and the firemen were getting [142] \$500 and an apartment.

Q. After five months you came back to Fairbanks? A. A little less than five months.

Q. Did you stop in Seattle on the way back?

A. Yes.

Q. For how long? A. Oh, for days.

Q. Can you tell me?

A. I was in Seattle March 16th. That is when we met at the bank with McAdams.

Q. How long did you stay there then? Until May? A. I stayed there until May.

Q. In Seattle. During this five-month period that

(Testimony of Cash Cole.)

you were away did Mr. Nowell come up here and manage the apartment?

A. I couldn't tell you, as a matter of fact, what time he was here.

Q. You do know, though, don't you?

A. I tell you I don't know. He was up here and I know he changed Mr. Popescue and I was in California and I don't know where he was.

Q. Let me refresh your recollection a little bit. You know he came up here for two or three days when he put Mr. Popescue in charge, don't you?

A. I don't know how long he was there. [143]

Q. You know he didn't come up here and stay for two or three months or five months while you were gone? A. No.

Q. You know that? A. I know that.

The Court: I think this would be a good time to quit for the evening.

Mr. Diamond: All right.

The Court: Adjourn until tomorrow morning at 10:00 o'clock.

The Clerk: Court is adjourned until tomorrow morning at 10:00 o'clock.

The Clerk: Court is adjourned until tomorrow morning at 10:00.

(Thereupon, at 5:05 p.m., October 5, 1953, an adjournment was taken to 10:00 a.m., October 6, 1953.)

* * *

October 6, 1953

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., October 6, 1953, plaintiffs and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding. [144]

The Clerk: Court is now in session.

Mr. Jaureguy: If your Honor please, I regret to advise the Court that Mr. Cash Cole, who was on the witness stand when we adjourned had a heart attack last night and will not be able to appear for further examination. For the same reason Mrs. Ruth Cole will not be able to respond to a subpoena.

The Court: Do counsel have any plan or anything to remark about at present?

Mr. Diamond: I don't know what counsel has in mind.

Can you tell us, is there any chance of Mr. Cole coming back while the trial is on, some time during the trial?

Mr. Jaureguy: As far as I can advise, and I can only give a layman's opinion and I don't doubt but what there are many laymen in the courtroom that know more about it than I do, he had a severe heart attack. I am advised this is not the first heart attack he has had. As a layman I would say the possibilities are he will not be able to appear in Court or elsewhere or be able to give testimony either in Court or otherwise for quite some considerable time, if at all.

The Court: There must be other witnesses that we can proceed with. [145]

Mr. Diamond: We have, your Honor, but I am concerned with this proposition that if Mr. Cole is not going to be here for the finishing of the examination, is counsel willing to go ahead and try the case and complete it even though Mr. Cole does not show as a witness for the defendant, or will counsel ask for a continuance because of his illness?

The question is that I hesitate about going ahead with our case and not be able to finish our case and then having counsel ask for a continuance or some delay at the end for Mr. Cole and we will not have accomplished anything. We will have an indefinite delay or an indefinite continuance.

The Court: I can state right here that I don't favor granting a continuance on just an oral statement of counsel. I think they should have the affidavit of a doctor, a practicing physician, to that effect, rather than to just take your statement for it.

Mr. Jaureguy: Yes, I understand. I am not asking for a continuance. As I understand Mr. Diamond's problem, though, is that perhaps when he gets through with his case we will ask for a continuance.

The Court: Yes.

Mr. Jaureguy: With respect to that, we have had no opportunity to consider anything of that kind either [146] pro or con. I don't want to give any assurance of that, I wish I could, but at this moment I do not feel I am in position to give any assurances. I personally have not had an opportunity to talk to Mr. Cole. I have serious doubts if within 48 hours I will speak to him on any subject

whatsoever. So any decision along that line would have to be made, if at all, by my associate and myself, so that I am not in position to assure counsel that I will or will not as matters progress ask for a continuance, but I can assure your Honor if I do it will be by a certificate or affidavit of a doctor.

The Court: You have not talked to the doctor yourself?

Mr. Jaureguy: No, I have not talked to the doctor. The doctor had left when I arrived at Mr. Cole's apartment. I have in the courtroom a man who was—no I am mistaken on that. I don't know whether he talked to the doctor or not. No, I don't think there is anybody in the courtroom that talked to the doctor.

The Court: I think there should be an affidavit of the doctor.

Mr. Jaureguy: As I say, I am not asking for a continuance.

The Court: You are ready to go ahead, [147] then?

Mr. Jaureguy: I will do just as counsel desires in that respect.

The Court: Now, if you like, I can adjourn the case until 2:00 o'clock this afternoon. In the meantime you can decide what you want to do.

Mr. Diamond: If the Court please, I feel that if we go ahead counsel should advise us that we can go ahead and complete the case whether or not Mr. Cole becomes available for this trial. If not, then I think counsel ought to ask for a continuance now, because I don't think we should be put in a position

—I am unable to complete my examination for our case but if I know that we can complete it anyway I will forego that by reason of the expense that we have incurred, the people that are here, and we will go ahead without it if we can be sure we can wind this case up.

Mr. Jaureguy: I can understand your concern about your problem but I will repeat that I will not now under the present stress of circumstances commit the defendants as to whether or not they will ask for a continuance. I am not saying that I can't make an assurance at 2:00 o'clock. I am saying under the stress of circumstances now and absolute inability to speak to Mr. Cole or talk to others that are close to him that could express an opinion, I cannot and will not commit myself at this [148] moment nor will my associate, I am sure.

Mr. Diamond: I wonder if counsel thinks that perhaps by 2:00 o'clock we could have something definite.

Mr. Jaureguy: I think if we could have an adjournment until 2:00 o'clock we could have a conference and discuss things and maybe we could work out a program.

Mr. Diamond: Could we perhaps adjourn for a shorter period of time, say, 11:00 o'clock, or at least have permission to contact the Court and the lawyers with reference to this matter this morning?

The Court: I will continue the case until 2:00 o'clock and if in the meantime you arrive at a conclusion and want to start sooner than two, I will be available anyway at that time on short notice.

Mr. Diamond: Thank you, your Honor.

Mr. Jaureguy: And I suppose your Honor would be available if we had some other type of program we wanted to consult your Honor on?

The Court: Yes, I will be right here ready.

Mr. Jaureguy: Very well, thank you.

The Court: Court is adjourned until 2:00 o'clock.

The Clerk: Court is recessed until 2:00 o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock of the same day.) [149]

(Thereupon, at 2:00 p.m., the court reconvened, pursuant to the recess.)

The Clerk: Court is reconvened.

Mr. Sczudlo: May it please the Court——

The Court: Mr. Sczudlo.

Mr. Sczudlo: In connection with this case, that is, the trial before the Court, both parties would ask for a recess for another half hour, until 2:30. They are still talking the possibilities of going ahead with the trial or continuing it indefinitely.

I would like the indulgence of the Court for another half hour.

The Court: Do you think that is sufficient?

Mr. Sczudlo: If they don't determine it in the next half hour they will either come in and ask the court to continue it until tomorrow or the day after, when perhaps Mr. Cash Cole can be contacted.

There is also some discussion going on concerning settlement, but nothing definite, so if the Court would indulge them another half hour it would be appreciated.

The Court: Very well, we will set it up for half an hour.

The Clerk: Court is recessed until two-thirty.

Mr. Sczudlo: Thank you, sir.

(Thereupon a half-hour recess was [150] taken.)

(Court reconvened at 2:30 p.m., pursuant to the recess.)

The Clerk: Court is reconvened.

The Court: Mr. Sczudlo.

Mr. Sczudlo: May it please the Court, the parties are still continuing their negotiations and have not come to a conclusion, and with the permission of the Court have agreed to a continuance until Thursday morning at ten o'clock, at which time they hope to have a definite report to the Court whether or not they can go ahead with the trial or whether they will have settled this particular case.

The Court: Ten o'clock Thursday.

Mr. Sczudlo: Thursday morning.

The Court: All right.

Mr. Sczudlo: We have two witnesses that the Court instructed to come back today, Mr. and Mrs. Scott. We would like to have the Court instruct them to come back at ten o'clock Thursday morning.

The Court: Very well, the witnesses are instructed to come back at ten o'clock on Thursday morning.

Mr. Sczudlo: Thank you very much.

The Court: All right.

The Clerk: Court is adjourned.

(Thereupon, at 2:35, the trial of this cause was adjourned until 10:00 a.m., Thursday, October 8, 1953.) [151]

October 8, 1953

Be it Remembered, that the trial of Cause No. 7298 was resumed at 2:00 p.m., plaintiffs and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Clerk: Court is reconvened.

The Court: This was the time set for trial of Cause No. 7298, Fairbanks Development, Incorporated, against Cash Cole.

Are the parties ready?

Mr. Diamond: The plaintiff is ready.

Mr. Jaureguy: I will say for the record, your Honor, we have reached an oral agreement, two or three or more agreements, that have not yet been reduced to writing and as I understand it from Counsel under those circumstances he wishes to proceed with the trial.

The Court: Very well, proceed.

Mr. Diamond: Do we have Ruth Cole?

Mr. Jaureguy: No. If you wish her, we will have her come.

Mr. Diamond: And she has some documents to bring with her.

Mr. Jaureguy: Will you tell her, Counsel says she has some documents she should bring?

The Court will understand that Mrs. Cole, [152] on account of her husband's condition and also because she didn't realize we were going to trial,

didn't appear, although she was under subpoena, and so she will be sent for.

The Court: Very well.

Mr. Diamond: If the Court please, at this time I would like to move for the appointment of a temporary receiver in this matter and for a continuance of this case, joint motions, until such time as Mr. Cash Cole, one of the defendants, can be present and complete his testimony on behalf of the plaintiff.

We have an affidavit which has been filed here by the defendant stating that Mr. Cole is ill and unable to resume the witness stand to complete the testimony on behalf of the plaintiff in this case.

The affidavit indicates that we don't know when he will be able to be available and we feel that we should under those circumstances be entitled, under the record of this case, to the appointment of a temporary receiver to take over the management and operation of this property until we can go ahead with the regular procedure in the trial of this action with all the testimony.

The evidence shows and the affidavit by the doctor that Mr. Cole is unable to be around and he can't manage [153] the property. He can't testify here and he can't take care of the property either. We need somebody to take charge of that property. We need the testimony of Mr. Cole as our case and we are entitled to have his testimony here. Undoubtedly the defendants are going to require his testimony.

I have made an offer that I would proceed with the testimony in this case to bring the trial to a conclusion and forego the testimony which I do require

from Mr. Cole, if he can't be here, with the understanding that upon the completion of all of the testimony in this case, if Mr. Cole can't be here the case will be submitted and completed.

I am unwilling, however, to go ahead with the trial and after the conclusion of all of our testimony and all of the case have counsel make a motion for a continuance and state that he has had no opportunity to examine or cross-examine in connection with the testimony of Mr. Cole or to state that Mr. Cole is a defendant, can't be here through illness, no fault of his own, and therefore should have a continuance.

It places an undue burden upon us; if counsel is going to insist on the testimony of Cash Cole, then we are going to insist upon the testimony of Cash Cole, and we ask that we be given the right or have the Court [154] appoint some disinterested party to look after and manage this property during the incapacity of Mr. Cole and during the pendency of this trial so that it can be properly looked after.

Your Honor knows that there are many affidavits in connection with the appointment of a temporary receiver in this case in the file.

Your Honor has heard the testimony so far in connection with this application. Your Honor knows that the party that has been acting as the manager, Mr. Cole, is ill, is in bed, is unable to even answer questions in the courtroom. If he is unable to do that, he is unable to manage the property.

Your Honor is familiar with the testimony in this case that Mr. Cash Cole has been taking prop-

erty from the corporation which rightfully belongs to the corporation and has wrongfully appropriated that property for his own good and use. To permit that situation to continue would be wrong to the corporation and to the stockholders of the corporation. I think therefore that we should have a temporary receiver appointed in this case and the case continued until Mr. Cole can appear and testify.

Mr. Jaureguy: In the first place I regret that I am constrained to remark that it is entirely with great regret that I note that counsel first sends for Mrs. Cole and then after her son has left the door he moves for a continuance, instead of waiting for disposition [155] on the motion for continuance.

We do not join with counsel in any of his motions. We, however, do not object to the granting of his motion for a continuance. He is now attempting to put me in the difficult position that he attempted to put me in Tuesday morning.

I will not commit myself that if they introduce a lot of testimony here about statements made out of court by Cash Cole or of any improper conduct on the part of Cash Cole, I do not commit myself that I will not ask for a continuance until he will have an opportunity to give his side of that story.

On the other hand, I do not commit myself that if they do not introduce that kind of evidence that I will not ask for a continuance. In other words, whether or not I will feel obliged to ask for a continuance depends entirely upon the situation as it exists at the time the plaintiffs rest, so I will not commit myself on that whatever.

I object to the appointment of a receiver. We have a lawsuit going on here. We have settlement negotiations, which I stated to your Honor, and which has not been denied, on which the parties here in this case and other cases have orally agreed on everything, and we are in the process of reducing those agreements to writing. So under those circumstances I think it is [156] entirely out of place.

I would venture to say that unless your Honor has the identity of persons in mind that you might possibly appoint as a receiver, that unless the opposing parties have decided that they don't want this settlement to go through before your Honor picks the receiver we would have the case settled anyway.

The Court: I am with you on this receivership business. I will appoint a receiver.

How much money is that receiver apt to handle? What bond should he have?

Mr. Diamond: I believe there is as much as \$40,000 a month coming into the apartment houses. I would think, though, that a bond for \$25,000 should be required.

The Court: Do you have any suggestions as to who the receiver should be?

Mr. Diamond: I am not familiar up here. I would ask Mr. Sczudlo. Anybody he might know or might suggest would be entirely satisfactory.

The Court: Before you say anything further, I would say that I notice Robert Sheldon has been manager up there during the absence of Mr. Cole at times and if he is here and would take the position, I would feel confident that he would be reliable. [157]

Mr. Diamond: He would be satisfactory to us, your Honor. We have no objection.

The Court: Well, now we will take a few minutes' recess and I will see if I can get in touch with him. We will take a ten-minute recess.

The Clerk: Court is recessed for ten minutes.

(Thereupon a ten-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: I have gotten in touch with Mr. Sheldon and he will accept and the bonding company will be ready to sign a bond within a few minutes. Will you prepare the bond?

Mr. Diamond: Yes, we will take care of the preparation of the necessary bond and the order.

The Court: What would that cost of bond come out of?

Mr. Diamond: Fairview Development will take care of it.

The Court: It comes out of the Fairview Development Company?

Mr. Diamond: Yes, that is correct.

The Court: In the first place?

Mr. Diamond: Yes, that will be a proper expenditure. [158] I assume your Honor is granting the motion to continue the case until Mr. Cole can be available?

The Court: Your other motion was that you wanted to go ahead now, wasn't it?

Mr. Diamond: I put it both ways. If the Court granted the motion to appoint a receiver, then the matter could be delayed until Mr. Cole could return and testify, and I think that would probably be the

proper procedure, unless counsel is agreeable to concluding the case entirely without the testimony of Mr. Cole, but I think Mr. Cole's testimony, as I stated, is proper for our case. It is also proper for theirs, and I think the case should be continued until Mr. Cole can appear and testify.

Mr. Jaureguy: While I think it is unnecessary under the Federal practice, your Honor understands that I save an exception to the order of the Court appointing a receiver.

The Court: Very well.

If that is what you want, then, is to continue the case, vacate this setting——

Mr. Diamond: Might I make one further request, if your Honor please? I have one witness that will not take very long and may be lost at a later date when the trial does come up. The witness is here, and I would like [159] to take that testimony so that it will be preserved for the trial when it is continued.

Mr. Jaureguy: I would have no objection, but I wish counsel would definitely state whether he wants Ruth Cole here today.

Mr. Diamond: No, as long as the case is being continued, Ruth Cole will not have to be here.

Mr. Jaureguy: I think she is on her way.

Mr. Diamond: You could call and cancel that. Then I will call Mrs. Scott, if you will come forward, please, and be sworn.

MRS. ARNOLDINE SCOTT

a witness called by the plaintiffs, was duly sworn and testified as follows:

Direct Examination

By Mr. Diamond:

Q. Mrs. Scott, will you state your name, please?

A. Arnoldine Scott.

Q. Where do you live, Mrs. Scott?

A. At present we are living at 1023 First Avenue.

Q. And you are married?

A. That is right. [160]

Q. Your husband is here in the courtroom?

A. Yes, he is.

Q. Mrs. Scott, you were connected with the Fairview Manor—Fairview Development Company—in some manner, were you? A. Yes.

Q. What was your position?

A. Cashier and bookkeeper.

Q. And for how long did you occupy that position? A. From August, 1951.

Q. Until when?

A. Until September 15, 1953.

Q. You just recently severed your connection with that company? A. That is right.

Q. Just what were your duties as bookkeeper in connection with the company?

A. Keeping all books of Fairview Manor and collecting rents.

Q. What has been your past experience as a

(Testimony of Mrs. Arnoldine Scott.)

bookkeeper? Have you had any experience as a bookkeeper?

A. Yes, I worked for six years for [161] Investors' Syndicate in Minneapolis, as assistant to the controller.

Q. Were you familiar with all of the books of account and the records of Fairview Development Company? A. Yes.

Q. Mr. Lofquist of Seattle was the certified public accountant? A. Yes.

Q. But you did all of the detail work for the corporation? A. That is correct.

Q. Under his general supervision?

A. Yes.

Q. Now, Mrs. Scott, do you know of some parts being purchased for a White truck belonging to Tom Cole? A. Yes.

Q. They were paid for by whom?

A. They were paid for by Fairview Development, Incorporated.

Q. Fairview funds.

Mrs. Scott, you stated that those parts were paid for by Fairview Development Company?

A. Yes. [162]

Q. They were parts for the White truck owned by Tom Cole? A. Yes.

Q. Was that truck used for business of the corporation? A. Not that I know of.

Q. To what account were the parts charged of the Fairview Development Company?

A. They were charged to automotive repair.

(Testimony of Mrs. Arnoldine Scott.)

Q. Mrs. Scott, do you know of an airplane ticket expense to Kansas or some place that was charged to Fairview Development Company?

A. Yes.

Q. Will you tell us what that is?

A. It was the plane ticket purchased for Candace Cole.

Q. Candace Cole is the wife of whom?

A. She is Tom Cole's wife.

Q. And this plane ticket was purchased for her and a ticket to where?

A. It was a ticket to Kanas City, I believe.

Q. And return? A. Yes.

Q. Do you remember the amount of that [163] ticket?

A. It was somewhere in the neighborhood of five hundred dollars.

Q. And what account was that charged to?

A. That was charged to manager's expense.

Q. Did she go back to Kansas on company business or corporation business?

A. Not that I know of.

Q. Was there any company or corporation business that you know of in Kansas? A. No.

Q. Mrs. Scott, don't you know that she went back there in connection with some illness in the family?

A. I believe that her mother was ill.

Q. Now, Mrs. Scott, were there some Christmas presents purchased and paid for by Fairview Development Company?

(Testimony of Mrs. Arnoldine Scott.)

A. I believe that there was one or two.

Q. Paid for by the corporation? A. Yes.

Q. Can you tell us what those presents were, who got them and how much they cost?

A. I don't exactly remember the cost, but one was a present for Mr. Rushlight and one was a present to Jim Cole. [164]

Q. Jim Cole is the other son of Cash Cole, is he not? A. Yes.

Q. Can you tell us approximately what they cost?

A. I believe that the present to Mr. Rushlight was some place in the neighborhood of thirty or thirty-five dollars.

Q. Do you remember what it was?

A. I think that Mrs. Cole told me it was a picture.

Q. And what was the other present?

A. It was a hassock.

The Court: It was what?

The Witness: A hassock.

Q. (By Mr. Diamond): A kind of footstool?

A. Yes, that is right.

Q. Could you tell me what that was charged to in the Fairview books?

A. I can't remember what account it was charged to.

Q. Were these expenses charged to the regular operating expenses of Fairview Development? [165]

A. Yes, they were.

Q. Were there some telephone calls made to

(Testimony of Mrs. Arnoldine Scott.)

Washington, D. C.?

A. I believe there was one.

Q. Was that company business or personal business of Cash Cole?

A. As far as I know it was personal.

Q. The furniture and household things that are in Mr. and Mrs. Cash Cole's apartment are owned by or were paid for, rather, by the corporation?

A. Some of them were, yes.

Q. Can you tell us the kind of things that were paid for by the corporation?

A. Well, the davenport, chairs, tables.

Q. Linen? A. Linens, yes.

Q. Silver? A. Yes.

Q. Such things as napkins, knives, and forks, and things of that sort? A. Yes.

Q. Do you remember the amount of furniture that was paid for in this apartment by the corporation?

A. I think it was some place around [166] thirty-five or thirty-six hundred dollars.

Q. What about the furniture in Mr. Everett Nowell's apartment? Who paid for that?

A. Fairview paid for that.

Q. Do you remember about how much?

A. I think that was around \$2,900 or three thousand dollars.

Q. That included carpets? A. Yes.

Q. Dishes? A. Yes.

Q. In addition to that, was a bar built in Mr. Nowell's apartment? A. Yes.

(Testimony of Mrs. Arnoldine Scott.)

Q. Or was that a coffee table?

A. Well, it was a counter, a breakfast counter or bar.

Q. And about how much did that cost?

A. It was some place around four hundred.

Q. Dollars? A. Dollars.

Q. That was paid as an expense of the corporation? A. Yes. [167]

Q. How often did Mr. Nowell occupy himself in that apartment?

A. Well, he did—I don't know how many times he came up here, but he would spend two or three days, sometimes a week.

Q. And about how many times was he up here, every month?

A. No. Sometimes he would come up twice a month and sometimes he wouldn't come up during the month.

Q. How much part did Mr. Nowell, so far as you know, play in the management and direction of employees or management of the project?

Mr. Jaureguy: I object to that as not within the personal knowledge of the witness.

Mr. Diamond: So far as you know.

The Court: Objection overruled.

A. Well, as far as I know, he took care of quite a bit of business in Seattle.

Q. (By Mr. Diamond): How about up here?

A. Well, when he was up here he helped take care of the management.

(Testimony of Mrs. Arnoldine Scott.)

Q. Now, Mr. Cole made some trips down to [168] Seattle and Portland, didn't he? A. Yes.

Q. And also down to California? A. Yes.

Q. Also made at least one trip to Washington, D. C., didn't he? A. I believe that he did.

Q. The expenses for those trips were paid by Fairview, were they not?

A. The trip to Washington, D. C. wasn't.

Q. He paid that himself? A. Yes.

Q. How about the other trips?

A. Well, as far as I know, the trip to California, the expenses while they were down there, were paid for by Mr. Cole.

Q. You mean the fare from Seattle down or the living expenses when he was down there?

A. The living expenses were paid for by himself.

Q. Did you hear Mr. Cole testify the other day those were charged to Fairview?

A. No, I didn't.

Q. When Mr. Cole went down to Portland, I ask you if you know whether he did some business in connection [169] with the Mooreland Construction Company or the new project across the way?

Mr. Jauregui: I object to that as hearsay, if your Honor please.

The Court: I think you should reframe your question.

Mr. Diamond: I think you are right, your Honor.

The Court: Objection sustained.

(Testimony of Mrs. Arnoldine Scott.)

Q. (By Mr. Diamond): Mrs. Scott, after Mr. Cole returned from a trip to Seattle and Portland, did he discuss with you any matters or make any statements in connection with the new construction he was planning across the street from Fairview?

A. No, he didn't.

Q. Didn't you know that he was working out a deal across the highway for an apartment house?

A. Yes, I did.

Q. Did you learn that from him?

A. Not directly from Mr. Cole.

Q. Where did you learn that?

A. Well, as far as I can remember, I believe it was through Mrs. Cole. [170]

Q. Tell me whether or not you know if he went to Portland in connection with that project.

Mr. Jaureguy: Same objection.

Mr. Diamond: Answer yes or no, whether you know.

Mr. Jaureguy: Same objection.

The Court: I will sustain the objection.

Q. (By Mr. Diamond): Mrs. Scott, were you there when the maintenance building on the Fairview property was moved across the highway to the new project? A. Yes, I was.

Q. Was anything ever set up on the books to pay rent for the use of that maintenance building?

A. No.

Q. Did you ever hear any discussion about paying rent for that maintenance building?

A. No, I didn't.

(Testimony of Mrs. Arnoldine Scott.)

Q. Mrs. Scott, you remember when you were told that Mr. Nowell was no longer on the payroll?

A. Well, I had a check made out for him and Mr. Cole told me not to send it.

Q. Did he tell you why?

A. That Fairview couldn't afford it. [171]

Q. Did he tell you whether or not Mr. Nowell was to receive any more salary payments?

A. We sent one check for five hundred.

Q. When was that?

A. I believe that was in March or April.

Q. That was a number of months later?

A. Yes.

Q. But at the time when he stopped you from making the payments you had previously been making, what did he say as the reason and as to how long it would go on and what about it?

A. He made no comment as to how long it would go on.

Q. At that time did Mr. Cole tell you that Mr. Nowell did nothing to earn that salary any way?

A. I can't remember him saying anything like that.

Q. Mrs. Scott, there was installed in the project a blower system for disposing of ashes by Mr. Cole. Do you know about that?

A. Yes.

Q. Do you remember about how much it cost?

A. Well, the ash conveyor and coal conveyor, I believe that came to some place in the neighborhood of \$15,000. [172]

(Testimony of Mrs. Arnoldine Scott.)

Q. Can you divide that between the ash conveyor and the coal conveyor?

A. No, all the work was done together.

Q. The ash conveyor was never very satisfactory, was it?

Mr. Jaureguy: I object to that as a leading question. He is asking too many leading questions.

Mr. Diamond: I will withdraw it.

The Court: Very well.

Q. (By Mr. Diamond): Mrs. Scott, I ask you whether or not the apartment house continued to use the ash conveyor after it was installed?

A. As far as I know, it is in use now.

Q. Did they use it continually?

A. I really don't know.

Q. Do you know whether or not it was used when Mr. Popescue was in charge of the operation?

A. No, I don't.

Q. You mentioned the five hundred dollars that was paid to Mr. Nowell in March or some such date, of this year, was it?

A. Yes.

Q. What were the circumstances of that [173] payment?

A. Jim Cole came in and told me that he had talked to his father and that we should make out a check for five hundred dollars for Everett Nowell.

Q. What did you charge it to on the books of the corporation?

A. Manager fee.

Q. What period of time did it cover?

A. I really don't know what it was supposed to cover.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you recall some work being done in connection with a forced air system for the chimneys on the property? A. Yes.

Q. And who did that work?

A. It was installed by the maintenance men of Fairview.

Q. Was there someone from outside that came up to do some work on it?

A. Mr. Christie came up to draw up the blueprints.

Q. Where did Mr. Christie come from?

A. He was employed by Rushlight.

Q. What was the nature of this work that he was doing on Fairview?

A. I really don't know too much about the [174] maintenance part of it.

Q. Do you know whether or not that forced air system is being used?

A. As far as I know, it isn't.

Q. Do you know whether or not it was ever used? A. It was used, yes.

Q. It was only installed on one building, was it not?

A. That is right, Building No. 4.

Q. And used for a short time?

A. I don't know how long it was used.

Q. Sufficient equipment was purchased for all four buildings, though, wasn't it?

A. I believe so.

Q. Never has been installed on the other three?

A. No.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you recall the incident when Jim Cole was fired or left the employ, rather?

A. Only through Jim Cole.

Q. Did you ever talk to Mrs. Cole about it?

A. No, I didn't.

Q. I don't think you can tell me what Jim Cole said, so I won't ask you. [175]

Do you recall Mr. Compbell from the Seattle Trust and Savings Bank coming up and making an investigation of the books and records of Fairview?

A. Yes.

Q. Was Cash Cole present in Fairbanks at that time? A. No.

Q. Who did Mr. Campbell talk to?

A. Jim Cole and myself.

Q. Did he also talk to Mrs. Jim Cole?

A. Yes—well, when we were present, he didn't.

Q. But he did at some other time?

A. That is what I have heard, yes.

Mr. Jaureguy: What is that? I didn't get that question and answer.

Mr. Diamond: That is what she has heard, that he talked to her at some other time.

Q. (By Mr. Diamond): Do you know whether or not that visit of Mr. Campbell's up here in connection with that had anything to do with Mr. Jim Cole's employment being terminated?

Mr. Jaureguy: I object to that on the ground that it is based on hearsay. [176]

Mr. Diamond: I asked if she knows. Answer yes or no.

(Testimony of Mrs. Arnoldine Scott.)

Mr. Jaureguy: I submit, your Honor, that is no answer to the objection.

The Court: I will sustain the objection. I think you can frame it so it won't be leading.

Mr. Diamond: Yes.

Q. (By Mr. Diamond): Do you know anything about a shipment of personal effects consigned to Cash Cole on March 30, 1953? A. Yes.

Q. Can you tell us what that is?

A. It was a shipment of their dishes and pictures.

Q. It was shipped up here in 1953?

A. Yes.

Q. Who paid the freight costs for shipping that household goods here?

A. It was charged to Fairview.

Q. To what account in Fairview?

A. I don't remember what that was.

Q. Was it charged as an expense of Fairview?

A. Yes.

Q. Do you remember about the cost of that freight [177] bill? A. No, I don't.

Q. If I suggested it was somewhere around \$322.90, would that be about right? Would that refresh your recollection?

Mr. Jaureguy: I object to the leading question.

The Court: Objection sustained.

Q. (By Mr. Diamond): Can you approximate the cost of it?

A. Well, I know that it was quite a bit. I don't remember the amount.

Q. Mrs. Scott, do you recall on one occasion

(Testimony of Mrs. Arnoldine Scott.)

when Mr. Cole was away for approximately five months, just a little short of that, outside?

Mr. Jaureguy: I object to that as a leading question.

The Court: I will overrule it or I will permit it, rather, under the conditions.

A. Yes, I do.

Q. (By Mr. Diamond): Can you tell us whether or not Mr. Cole got paid \$1,000 a month during that period of time he was away? A. Yes.

Q. Was he away on other occasions, too? [178]

A. He was gone this year for around three months.

Q. Was that sometime in April to August?

Mr. Jaureguy: Did you say April to August?

Mr. Diamond: April to August.

Mr. Jaureguy: I object to it as a leading question.

Mr. Diamond: I will reframe the question. I don't think it is proper.

The Court: Yes.

Q. (By Mr. Diamond): Did Mr. Cole get paid \$1,000 a month during those three months that he was away? A. Yes.

Q. Do you know where he was all that time?

A. I believe that he was in Seattle.

Q. Do you know whether or not he was in Portland? A. No, I don't.

Q. Can you tell us approximately when that occurred?

A. He was gone during May and June, I think.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you know whether or not the Fairview Development was charged for two electric [179] blankets?

A. Yes.

Q. As an expense of the corporation?

A. Yes.

Q. What became of them?

A. They are in Mr. Nowell's apartment.

Q. Mrs. Scott, I ask you if you know whether or not Morrissey, Eagan & Walsh in Seattle were paid any money by the corporation?

A. I think that they were.

Q. You don't recall the amounts of the payments that were made?

A. Not exactly.

Mr. Diamond: Mr. Jaureguy, I assume the books are still not here in the courtroom. They aren't here, are they?

Mr. Jaureguy: No. They are in the office of the company.

Q. (By Mr. Diamond): Can you tell me what that law firm did for the corporation?

A. I don't know. The statement just read "For services rendered."

Q. Do you know whether or not anything was paid to Sam Wright or the firm of Wright, Boothe and Beresford in Seattle? [180]

A. Yes, there was an amount paid to them.

Q. Do you remember that amount?

A. No, I don't.

Q. Was there anything ever paid to my law firm, Lycette, Diamond & Sylvester?

A. No.

(Testimony of Mrs. Arnoldine Scott.)

Q. Mrs. Scott, do you know anything about Mr. Cole being bonded in connection with his job?

A. No, I don't.

Mr. Diamond: That is all. You may inquire.

Cross-Examination

By Mr. Jaureguy:

Q. Mrs. Scott, you have testified about several charges made on the books of the coporation which apparently from your description were for personal purposes of individuals.

Do you know anything about reimbursement to the corporation for any of those charges?

A. Well, some of them have been paid back.

Q. Could you tell us which ones have been paid back? Would it be easier if I named them one at a time?

A. Would you do that, please?

Q. Yes, certainly. [181]

The parts for a truck you said were charged to automotive repairs. Was there reimbursement for that?

A. There was a partial reimbursement at the time I left.

Q. And how long before you left was that reimbursement?

A. Oh, I would say about three weeks.

Q. How long after the parts were purchased was that reimbursement made?

A. It was about a month, I think.

Q. Do you know whether the corporation has yet paid for those parts?

(Testimony of Mrs. Arnoldine Scott.)

A. Yes, the corporation has.

Q. Now, what about the airplane trip for Tom Cole's wife, do you know whether there was reimbursement for that?

A. There was a partial reimbursement.

Q. And do you know what that partial reimbursement consisted of? What was the extent of the partial reimbursement?

A. I really couldn't say offhand.

Q. Would you say it was the major portion of it, or would you know? [182]

A. No, it wasn't.

Q. Do you know whether or not Mr. Cole has any business with any Governmental agency in Washington, D. C.—I mean business for the corporation?

A. Well, he probably would have with F.H.A.

Q. Do you know whether the telephone call or calls that you referred to were in connection with that business?

A. No, I don't.

Q. I better get back to this man Rushlight. That picture that was given him, do you know whether there has been any reimbursement for that?

A. So far as I know, there wasn't.

Q. And the footstool for Jim?

A. I don't believe that there was on that.

Q. Have you any reason to believe that when Mr. Cole was in Seattle or Portland, that he wasn't performing services on behalf of the corporation?

A. No.

Q. This maintenance building, that, as I understand it, was moved across the street to the Moore-

(Testimony of Mrs. Arnoldine Scott.)

land Court premises? A. Yes.

Q. How long before you left was that move made? [183]

A. It was about two or three days before I left.

Q. Two or three days before you left. Now, when you would make these charges with respect to these various amounts that you testified to, was there somebody that told you where to make the charges, or was that your responsibility to determine that?

A. On these items that were charged on the truck I asked Jim Cole what I should do with them and he told me to charge them to automotive repair.

Q. Was Jim Cole there when you made those?

A. Yes.

Q. How long ago were those repairs made?

A. Jim Cole left in June.

Q. They were made before that?

A. They were made prior, yes.

Q. Mrs. Scott, you have referred to a blower system and ash disposal system.

Do you know what the purpose of those systems was? I think they put in a blower system, didn't they, and a conveyor system and also some chimneys? A. Yes.

Q. Do you know what the purpose of doing that work was? [184]

A. The blower system was to cut down on the coal expenses and to make the boilers work better.

Q. Do you know how the boilers worked before that system was put in?

A. No, I really don't.

(Testimony of Mrs. Arnoldine Scott.)

Q. Do you know whether it improved the boiler and furnace systems?

A. Well, only through what I overheard the men talking about.

Q. And who was it you heard?

A. Jim Cole and Tom Cole and Elmer Miller.

Q. As I understand, the blower system is still there?

A. As far as I know it is.

Q. At least it was there when you left?

A. Yes.

Q. And during all the time you were there?

A. Yes.

Q. The same with the conveyor system?

A. Yes.

Q. Could you give us some kind of a description of what that consisted of?

A. One of them was to—the coal conveyor was to bring the coal from the coal bin and feed it into the stoker, and the ash conveyor was to convey the ashes from [185] the furnace across the road in the back of Fairview.

Q. Prior to the time they got those conveyor systems, how did they convey the coal into the furnaces and the ashes out of the furnaces?

A. The men did it by hand.

Q. That is with buckets?

A. Yes.

Q. And the furnaces are down in the basement some distance below the street, aren't they?

A. Yes.

Q. And the men have to go quite some distance through the basement from the street in order to get to the furnace room; that is correct, isn't it?

(Testimony of Mrs. Arnoldine Scott.)

A. Yes.

Q. And so with the ashes, they would take a bucket of ashes out of the furnace and go some distance through the basement and go across the street and dump it in the ash can?

A. That is right.

Q. And now it is automatic? A. Yes.

Q. And the coal system is automatic?

A. Yes.

Q. The chimneys they put on, they put all four chimneys on there, one on top of each apartment house; [186] that is correct, is it not?

A. Yes, that is correct.

Q. And as far as you know, they are still there operating? A. Yes.

Q. This truck that these automotive repairs were put on, was that Jim Cole's truck, or was it Tom Cole's truck, or do you know who it belonged to?

A. I believe it belonged to Tom Cole.

Q. Do you know whether that truck has been used for any corporation business for hauling things around for the apartment houses?

A. I don't believe it has been.

Q. I suppose that before you came to testify you talked to the attorneys for the plaintiffs about the testimony? A. No, I haven't.

Q. So that they didn't know what you were going to testify to when you took the stand?

A. No.

Q. Has any of the attorneys spoken to you about coming to testify?

A. Mr. Sczudlo called me and asked me if I

(Testimony of Mrs. Arnoldine Scott.)

would, but I didn't talk to him.

Q. And what did he say when he asked you [187] to come? A. I really don't remember.

Q. Is what you have told us the sum total of what you can remember as to what he said?

A. Yes.

Q. You don't remember anything else he said about it? A. No.

Q. And you didn't talk to any of the attorneys about what your testimony would be?

A. No.

Q. Did you talk with anybody else about what your testimony was going to be?

A. Only my husband.

Q. Just your husband, and nobody else?

A. No.

Mr. Jaureguy: That will be all, thank you.

Mr. Diamond: That is all.

(Witness excused.)

Mr. Diamond: If the Court please, Mr. Sczudlo tells me he has a form of order to present for the appointment of a receiver which will be here in a few minutes.

That is all the testimony I wanted to put on [188] to preserve that for the trial when it resumes.

The Court: Very well. We will take an adjournment until what time?

Mr. Diamond: I would say it will probably be about 15 or 20 minutes. We can call upon the Court when it is completed. We can present the order and have it entered.

The Court: Do you agree to the selection of Mr. Sheldon?

Mr. Diamond: Yes, I have.

The Court: We will take a 15-minute recess and I will be in my chambers if you want to see me before that.

The Clerk: Court is recessed for fifteen minutes.

(A 15-minute recess was taken.)

The Clerk: Court is reconvened.

The Court: Is there anything further to be presented to the Court at this time?

Mr. Sczudlo: If your Honor please, our motion to continue the trial generally is now before the Court until such time as Mr. Cash Cole can return to the stand. In view of the coming jury cases, I think it should be continued generally. [189]

The Court: Very well, the cause is continued generally.

Mr. Jaureguy: I wonder if we can have the accommodation of asking that if any counsel asks to have it come up for trial we can get a week's notice of the application.

Mr. Diamond: I would say: make it reasonable notice.

Mr. Jaureguy: Unless we happen to be in Fairbanks.

Mr. Diamond: Reasonable notice. You didn't want it to come up any faster than that? It might take us more than a week to get ready to come up for the trial.

Mr. Jaureguy: I would say that is the minimum.

Mr. Sczudlo: What you are asking is in the event we want to set a new trial you have at least a week's notice of it?

Mr. Jaureguy: Yes.

Mr. Sczudlo: As a matter of fact, the Court would require a notice to be sent out in writing at least ten days before the trial and then the Court would reset the trial at that time.

The Court: Mr. Clerk, here is the order appointing the receiver. [190]

The Clerk: Very well, sir.

The Court: This cause is adjourned generally.

The Clerk: Yes, sir.

(Thereupon, at 3:40 p.m., October 8, 1953, an adjournment was taken.)

* * *

United States of America,
Territory of Alaska—ss.

I, Esther M. Midthun, do hereby certify that I was the official court reporter on October 5, 6, and 8, 1953, the dates upon which the trial of Cause No. 7298 was had, and that the foregoing transcript, pages 1 to 191, inclusive, constitutes a full, true, and accurate transcript of my shorthand notes taken at the trial in Cause No. 7298.

Dated this 12th day of March, 1954.

/s/ ESTHER M. MIDTHUN.

[Endorsed]: Filed March 15, 1954. [191]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS OF
JUNE 4, 1954

Be It Remembered, that upon the 4th day of June, 1954, the above-entitled cause came on for argument before the Honorable Harry E. Pratt, District Judge.

* * *

The Court: Mr. Sczudlo.

Mr. Sczudlo: Yes, sir.

The Court: I believe your matter was first.

Mr. Sczudlo: May it please the court, this is in the case of Fairview Development, Inc., vs. Cash Cole. We served the counsel for the defendant with notice that we would request the court at this time to set a bond, either a supersedas or a cost bond, or both, or to strike their notice of appeal for failure to file a cost bond. This afternoon, however, or just when I came in the courtroom, the Clerk showed me the file in which a cost bond for \$250 had been filed as of yesterday, but it has not been approved by the court as far as I can tell from the court file.

We feel that the cost bond in this case should be more than \$250. Our brief alone will probably cost that amount, or approximately that amount in the appeal. Likewise, we feel that we should be protected on an additional record we may require. We have no idea at this time what size the record will be or what the appellants are going to request as the record. It has been generally our experience

that we usually have to require an additional record for which we have to pay ourselves until the appeal is over, and such additional record may run anywhere from two hundred fifty dollars to a thousand dollars, so we feel a reasonable cost bond in this particular case, where an extensive record would be involved, should be about a thousand, five [2*] hundred, if we have a corporate surety, or it should be probably twice that amount on individual sureties.

Now, I don't know whether counsel intends to file a supersedas bond in this proceeding or not, but if he does, I think the same order should provide for a supersedas bond, and we feel that in view of the fact that the rental collections at that place are over thirty thousand dollars a month, such a bond should be at least two hundred fifty thousand dollars, if corporate sureties are provided. I don't think we even care to argue the size of the bond in the event of individual sureties. We feel that where bonds of that size are involved, individual sureties are in no position to meet bonds of that size, nor have they ready assets which could be converted to pay under such bond.

If the court please, we feel that a cost bond in this case should be set at fifteen hundred dollars with corporate sureties; that the bond now on file should not be approved; and that a supersedas bond, if one is filed by the appellant, should be set in the sum of two hundred fifty thousand dollars with corporate sureties. I have two or three cases I could cite to the court as to corporate sureties if the court so desires. There are no recent cases on this matter of

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

sureties. The court is probably familiar with respect to the discretion given to the court where it provides that the sureties shall be approved by the court.

In attempting to check the law on that point, I found an old case, 44 United States 483, in which it held [3] that the judges of the courts are the sole and exclusive judges of the type of security and the amount of security that shall be provided. That is in the case of supersedas bond. It specifically had to do with supersedas bonds. I have not been able to find where this case has ever been reversed or where the Federal Rules have changed that. As a matter of fact, the present rules, Federal Rules confirm the fact that the court will determine the surety and determine the type of surety. I refer specifically to Rule 37(d) and (e).

In the case of *Ray v. Morris*, 170 Federal 2nd, 498, the court stated "An appeal is granted to a losing party on condition that he complies with statute permitting appeal, and appellant must be held to have known of existence of statute, requirements of which are jurisdictional and cannot be avoided." That case, of course, is in point with respect to requiring a cost bond, since the rule states that a cost bond shall be filed at the time that a notice of appeal is filed.

Thank you, sir.

Mr. Taylor: If the court please, the rule provides a cost bond shall be two hundred fifty dollars. That is a flat amount of the cost bond. And in the event of a supersedeas—or in the event of a reversal

of the case, the circuit court can assess further costs against the losing party, but they say first it must be a flat two hundred fifty dollars. [4]

Now, as to the matter of the supersedeas bond, I think the court heretofore stated that the supersedeas bond would be two hundred, and—two hundred thousand dollars. We feel that that, your Honor, is grossly unreasonable in view of the fact that the court has taken the property away from Mr. Cole and placed it in the hands of a stranger, and has only required a fifty thousand dollars bond, your Honor. If one party takes it and only puts a fifty thousand dollar bond up, it would seem only just and equitable that if the other party who has had it in his possession all this time, and who has operated it efficiently and has applied the money on the payment of the fixed charges and the expenses, if he retains it he should only be required to put up a fifty thousand dollar bond.

I think, your Honor, if we are required to put up a two hundred fifty thousand dollar bond, we feel that the receiver should likewise, your Honor, put up a bond in an equal sum. It seems like the equities should be equal in this matter, your Honor, and so far as I know, I don't know whether we would be able to get a bond of two hundred fifty thousand dollars. The court intimated that would be the amount, but we feel that the receiver's bond, your Honor, should be at least equal to the amount that you are requiring the defendant in this case to put up.

The Court: You may—just mind telling us just

us what all matters should be secured by this supersedeas bond? What are the matters? [5]

Mr. Sczudlo: The principal matters that should be secured by the supersedeas bond is the cash that is being collected at the building. That is thirty thousand dollars a month, at least, or more. The appeal will last at least a year, but even if we say ten months that would be three hundred thousand dollars which would be collected and no accounting made for that three hundred thousand dollars as it isn't subject to the court's control.

The Court: How is that money taken care of?

Mr. Sczudlo: In the case of the receiver, the court has specifically directed him to deposit that money in the First National Bank and he is not to draw it out except by check countersigned by the public accountant, Mr. Ray Kohler. On top of that, the court has directed that the receiver give a monthly accounting at the end of each month whereby this court is advised at all times what funds are collected and where they are kept and they cannot be disbursed except by the receiver and Mr. Kohler.

In other words, though there is thirty thousand dollars being collected a month, this court has also required the receiver to put up fifty thousand dollars corporate surety. The court at the end of each month can take the receiver out if he should in any way misappropriate any of the funds so that the argument put up by Mr. Taylor that the receiver should put up as large a bond is not appropriate at this particular time. It has no point here. We have

two [6] different set-ups. In the case of the receiver, he is an official of the court fully under the control of this court at all times. The court has control of all the funds at all times.

The Court: Is there any mortgage on the property?

Mr. Sczudlo: There is a mortgage of approximately three million dollars. That is the balance at the present time on which there has to be paid twenty-one thousand dollars a month, and the receiver has already informed the court that at the time he was appointed the payment for May 1st was in default, and it wasn't until the end of the past—of May that the receiver was able to pay it off because of the mishandling of certain funds in that particular building by the prior management. As a matter of fact, the court even permitted the receiver to borrow five thousand dollars in order to prevent that installment being in default. Now, the same thing is what we would be worried about in the case of a supersedeas.

* * *

The Court: Who is the mortgagee?

Mr. Sczudlo: Institutional Securities Corporation of New York. They are not a party to this case and, of course, the mortgage is secured by the FHA, a government agency, and they have already directed a letter to the receiver requesting them to have an audit made of all the books because they are concerned about the financial condition of the plaintiff corporation in this case.

The Court: Very well. [7]

Mr. Sczudlo: I would like to point out with re-

spect to counsel's statement about the flat bond in the case of a bond on appeal, the provisions of rule 73(d) is as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required." The rule specifically provides that the court may fix a larger amount and obviously here where we go to the Ninth Circuit and we do run into extensive expenses for printing briefs and printing the record, a bond of two hundred fifty dollars is hardly sufficient to cover the costs of the opposite party, and we feel that a bond of fifteen hundred is a minimum which should be provided as a cost bond.

As far as the supersedeas bond is concerned, as I pointed out, there are collections of over thirty thousand dollars a month, that is in ten months over three hundred thousand dollars. On top of that, our costs should be secured by a supersedeas bond. Also, any profits that may be lost or any misappropriation of funds made during that period, so a bond of two hundred fifty thousand dollars should be a minimum bond, and it should have corporate sureties. At the end of the appeal, if there are losses or damages to the plaintiff, they should be adequately protected [8] especially if the mortgage should go in default and the entire property should be lost during the period of appeal through a foreclosure,

as they were on the verge of doing when the court appointed a receiver.

Mr. Taylor: Your Honor, I object to that last statement as an untruth. The mortgage institution, the Institutional Securities Company, was very well pleased with the management of the corporation by Mr. Cole. The only reason they were in default, your Honor, was the fact that Mr. Sczudlo's clients stole so much of the money in the construction of it, that they had to spend one hundred forty some thousand dollars of the rents to make the place liveable. I just wanted to correct Mr. Sczudlo on that account. It wasn't the inefficiency of Mr. Sczudlo's clients, it was their dishonesty, their stealing of the money from the government that was supposed to go into that building.

Now, Mr. Sczudlo looks at this one point. He says my point is such and such. Is it not proper that if the court directed that Mr. Cole continue in possession of that place up there that he could put the same safeguards around the distribution of the income as he does with Mr. Sheldon. If a fifty thousand dollar supersedeas bond is put up, the court could require Mr. Cole to submit each month a monthly accounting; and the first month that Mr. Sheldon is in office he has to borrow five thousand dollars. Mr. Cole did borrow seven thousand five hundred dollars during the winter, but that [9] was all being caught up, and at this time Mr. Sheldon is operating the place, your Honor, actually he is driving tenants out of there. I have been up there and I know just about what it is, and he is going

to borrow money next month, too, and the Institutional Securities Company have actually a bona fide cause to feel alarmed at the present time under the present management, your Honor.

We feel that fifty thousand dollars is sufficient bond for Mr. Sheldon; that fifty thousand dollars with the same safeguards thrown around the distribution of the money by Mr. Cole would be equitable and fair.

The Court: The court fixes the cost bond at fifteen hundred, a fifteen hundred dollar bond to be given by a company who is justified under the rules of the Treasurer of the United States. Now, then, as a supersedeas bond, I fix that bond at two hundred fifty thousand dollars, bond to be executed by a company that has the approval of the Treasurer of the United States for going on bonds.

Mr. Taylor: Does the court mean that on the cost bond for fifteen hundred you won't recognize sureties with adequate property, your Honor?

The Court: Well, I think so. I think that is what would be the result of it.

Mr. Taylor: It must be a surety company bond.

The Court: Yes.

Mr. Sczudlo: Does the court desire a draft order on that? [10]

The Court: Yes, if you please. You will submit them. Now, let's see. Is there anything else you wanted passed upon? Is that all you wanted passed on at this time?

Mr. Sczudlo: There is another motion pending

in this case with respect to the notice, but I hadn't noticed it for hearing at this time, and I don't know whether Mr. Taylor would care to argue it. It is a motion to strike the name of Fairview Development Company as a party to the notice for appeal. This motion was filed back in May, May 10, 1954, on the same day on which the notice of appeal was filed.

The plaintiff Cash Cole included Fairview Development Company the plaintiff in the case with himself as one of the parties appealing from the court's order. All through this case our office has represented Fairview Development Company. There has never been any substitution of attorneys and the inclusion of Fairview Development Company as a party to the notice for appeal is entirely wrong since we represented them as the plaintiff in the case throughout the proceedings, and they should be stricken from the notice of appeal.

Mr. Taylor: If the court please, I—we can decide that very shortly. At a meeting of the stockholders of the Fairview Development Company, Mr. Bell and I were chosen as attorneys for Fairview Development Company and for Mr. Cole, and the inclusion of the name Fairview Development Company as a defendant, your Honor, is more justified than the inclusion of the Fairview Development Company as the [11] plaintiff because there was no meeting of the Board or no action of the Directors in authorizing the institution of this suit by the Fairview Development Company.

And another thing, your Honor, I don't know whether—I believe they are in evidence, too, the

Articles and the Bylaws of the corporation say that as the stock was held fifty-fifty between the two factions that in case of a dispute they must be submitted to Kenneth Kadow, and in case that he wasn't available to Mr. Sumter who would make the decision, but in no case has it ever been shown that that procedure has been followed here so the inclusion of the Fairview Development Company as a defendant is more justified than the inclusion of Fairview Development Company as the plaintiff, and I think it comes a little late now, your Honor, when it is on appeal for this court to make any changes in that title.

Mr. Sczudlo: I don't understand what Mr. Taylor says, if there is any—that it comes too late to make any changes in the title when he is himself trying to do that. The Fairview Development Company was a party plaintiff right from the beginning of this case, and long before Mr. Bell or Mr. Taylor came into this case. They came into this case as far as I know, only in January of this year, after a final settlement had been made and after a final decree had been entered. They came in to have that settlement upset and the decree reopened. At that time Fairview Development Company was a party plaintiff. They made no effort under [12] the procedures outlined in the statutes of Alaska to question the authority of ourselves to represent those plaintiffs. There is nothing in the record at any time that they questioned our authority as the attorneys for the plaintiff right from the beginning of this case, and it has been pending about a year and

a half or so, so he is attempting at this time to switch the position in connection with the appeal of Fairview Development Company from plaintiff to defendant appealing from a judgment which was rendered in its favor and in favor of the other plaintiffs.

I just don't understand his argument. It is rather ambiguous and confuses me. I think the only proper party to this notice of appeal is Mr. Cash Cole and the Bayview Realty Company against whom the judgment of this court ran. As far as the Fairview Development is concerned, the plaintiff corporation, this was a stockholders' suit which we filed and we filed on behalf of all stockholders who did not agree with the management then in possession. So I feel that the inclusion of Fairview Development Company should be stricken from the notice of appeal because we are their attorneys and we are objecting to them being included in a notice of appeal.

The Court: This is the defendant's notice?

Mr. Sczudlo: That's right, sir. The motion is our own. The plaintiff's motion. We are making the motion on behalf of Fairview Development Company plus the other [13] plaintiffs and asking that the name of Fairview Development be stricken from the notice of appeal where they are brought in as being represented by Mr. Bell and Mr. Taylor. We are objecting to them being included there and we represent them, and we are making this motion on behalf of Fairview Development Company to have its name removed from the notice of appeal.

The Court: Well then the matter will be decided

for the present by an order denying the motion?

Mr. Sczudlo: No, it will be decided by an order allowing the motion, that is, to strike the Fairview Development Company from that notice of appeal.

The Court: Oh, it is to strike it from the notice of appeal?

Mr. Sczudlo: Yes, sir.

The Court: That is what your motion is for? All right, your motion is denied then.

Mr. Sczudlo: The motion is denied, sir, or granted?

The Court: It is granted.

Mr. Sczudlo: May I include that in my draft order with the other, sir?

The Court: Yes.

Mr. Sczudlo: Thank you, sir.

Mr. Taylor: If the court please, in such a decision I believe that the court also should strike Fairview Development Corporation from the title in the plaintiff cause there [14] was no action by anybody that authorized the Fairview Development to bring this action. If it is a stockholders' scrap let them take the stockholders, because there wasn't any way they could break the deadlock as they called it. In fact, they admit in their pleadings there was a deadlock and they couldn't take any action and so failed to follow the procedure of having the arbitrators decide it so Fairview Development should not be a plaintiff if they cannot be a defendant. We move that it be stricken from there and let it be a stockholders' fight.

The Court: Well, there is nothing before the

court at this time. That has been passed on and I see no reason for opening up or rescinding anything I have said.

* * *

United States of America,
Territory of Alaska—ss.

I, Mary F. Templeton, official court reporter for the aforementioned Court, do hereby certify:

That the foregoing pages numbered 1 to 15, inclusive, constitute an accurate transcript of my original shorthand notes of that portion of the oral proceedings had upon the 4th day of June, 1954, in open Court in Cause No. 7298 Civil.

Dated at Fairbanks, Alaska, this 24th day of June, 1954.

/s/ MARY F. TEMPLETON. [15]

[Endorsed]: No. 14424. United States Court of Appeals for the Ninth Circuit. Cash Cole, et al., Appellants, vs. Fairview Development, Inc., et al., Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the District of Alaska, Fourth Division.

Filed July 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 14,424

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

**On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.**

BRIEF OF APPELLANTS.

WARREN A. TAYLOR,

Fairbanks, Alaska,

WILLIAM H. SANDERS,

BAILEY E. BELL,

Central Building, Anchorage, Alaska,

Attorneys for Appellants.

FILED

APR 11 1955

PAUL P. O'BRIEN, CLERK

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No. 14,424

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

**On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.**

BRIEF OF APPELLANTS.

JURISDICTION.

The Jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The Jurisdiction of the Court of Appeals rests on Section 1291, of the New Federal Judicial Code, and Federal Rules of Civil Procedure.

STATEMENT OF CASE.

Bayview Realty, Inc., was incorporated in September 1949 under the laws of Alaska by the defendants, Everett Nowell and Cash Cole and the wife of Cash

Cole, Ruth M. Cole. Everett Nowell was elected President, Ruth Cole Vice President and Cash Cole Secretary-Treasurer. Cash Cole was, by resolution given full authority to act in all business matters concerning the corporation. (TR 195)

Everett Nowell placed \$10,000.00 in Bayview Realty, and Kenneth Kadow, then a special agent for the Department of the Interior for the promotion of housing in Alaska, placed a like amount for the credit of Bayview Realty for which he received a note. (TR 196)

In the meantime Cash Cole had been negotiating with the City of Fairbanks for a lease on city ground for a large housing project and had, after having expended considerable time and money, secured a 75 year lease on said ground.

Cash Cole then began negotiations with the FHA in Juneau, Alaska, for a commitment which was finally granted. (TR 196)

Cash Cole then incorporated Fairview Development, Inc., with Everett Nowell as President, Cliff Mortensen as Vice President and Cash Cole as Secretary-Treasurer. Upon incorporation of Fairview Development, Inc., the lease of land from the City of Fairbanks was put in the name of the corporation. (TR 196-197)

Cash Cole thereupon went to Seattle to complete arrangements with Nelse Mortensen-Alaska, Inc., for the erection of the said housing project. (TR 197)

Bayview Realty, Inc., owned 450 shares of stock in Fairview Development, Inc., which was 50% of the

common capital stock of this corporation representing 50% of the voting stock which stock was owned by Cash Cole and placed in Bayview Realty by him as his contribution to said corporation, representing 15 months of time and expenditure of over \$10,000. (TR 199)

Pursuant to negotiations with Nelse Mortensen-Alaska, Inc., Fairview Development, Inc., on July 10, 1950, entered into a written contract with said corporation for the construction of a multiple apartment building on the leasehold estate, owned by Fairview Development, Inc. This apartment building was to be known as Fairview Manor Apartments and Fairview Development, Inc., agreed to pay Nelse Mortensen-Alaska, Inc., \$3,080,000.00 for the construction (TR 22-23)

Subsequently Nelse Mortensen-Alaska, Inc., was dissolved and Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, plaintiffs herein, who were all of the directors and stockholders thereof, took possession and control of all of the assets of the corporation and assumed all of the liabilities.

Thus Nelse Mortensen, Cliff Mortensen and Frank Henderson became trustees for the assets of the corporation and are, as trustees, liable for its liabilities.

These individuals are now co-partners doing business as Nelse Mortensen-Alaska Company. (TR 22)

On June 15, 1950, a contract was entered into between Bayview Realty, Inc., Cash Cole and Everett Nowell as parties of the first part and Nelse Mortensen, Cliff Mortensen and Frank Henderson as par-

ties of the second part wherein it was agreed that, upon completion of the housing project, Bayview Realty, Inc., should have the management and operation of the housing project in behalf of Fairview Development, Inc. (TR 24)

A special meeting of the Board of Directors of Fairview Development, Inc., was called on August 3, 1951, for the purpose of effectuating this contract and to enter into a contract for the management of the apartment building.

Accordingly a proper resolution was passed at this meeting, providing that a contract should be executed between Fairview Development, Inc., and Bayview Realty, Inc., whereby Bayview Realty, Inc., would assume the management of Fairview Development, Inc., and that Fairview Development, Inc., would pay Bayview Realty, Inc. 5% of the total income of Fairview Development, Inc., with a minimum guarantee of not less than \$2,000.00 per month plus all expenses incurred by Bayview Realty, Inc. It was further decided in this resolution that should Bayview Realty, Inc., be dissolved then the provisions of the contract would apply to Everett Nowell and Cash Cole.

Pursuant to this resolution, a contract, embodying these terms was executed by and between Fairview Development, Inc., and Bayview Realty, Inc., on December 1, 1951. (TR 24-25)

Thereafter Cash Cole and Everett Nowell, acting as officers and directors of Fairview Development, Inc., and as officers and directors of Bayview Realty, Inc., managed Fairview Manor, collecting and disbursing

the rentals, always with the best interests of the project and the corporation in mind.

For such work Cash Cole and Everett Nowell have received a salary, justified by the fact that they were President and Secretary-Treasurer, as well as directors of the corporation, and also by the action of the Board of Directors on August 3, 1951, and the subsequent contract entered into pursuant thereto on December 1, 1951.

Notwithstanding this contract Everett Nowell took himself off the payroll on January 1, 1953, when drastic economies became necessary and consequently Bayview Realty, Inc., owned by Cash Cole and Everett Nowell, received less than the amount specified as the minimum in the contract of December 1, 1951.

Cash Cole and Everett Nowell occupied apartments in Fairview Manor which was necessary for the proper management thereof. This was especially helpful to the corporation as the management was available 24 hours per day and there were many vacant apartments at all times.

In the meantime Nelse Mortensen, Cliff Mortensen and Frank Henderson refused and neglected to pay certain obligations for which they were liable under the contract of July 10, 1950, such as interest on the mortgage in the amount of \$18,299.51 and real estate taxes in the amount of \$31,612.00. These plaintiffs further neglected to complete the construction of the housing project according to the terms of the contract, but nevertheless received the entire \$3,080,000.00. It was therefore necessary that the defendants

make such payments from the assets of Fairview Development, Inc., and also that these defendants spend large sums of money to alleviate the shortcomings in construction in order to make the project suitable for occupancy. (TR 29-30)

On October 31, 1952, the plaintiffs, Fairview Development, Inc., Nelse Mortensen, Cliff Mortensen and Frank Henderson filed suit in the District Court for the Territory of Alaska, Fourth Division against Cash Cole, Everett Nowell and Bayview Realty, Inc., joining therein the First National Bank of Fairbanks and the Bank of Fairbanks.

Plaintiffs alleged in their complaint that the defendants Cash Cole and Everett Nowell had wrongfully usurped possession of the premises of Fairview Manor and had controlled and disbursed the rentals therefrom without authority and without accounting therefore to the plaintiffs. (TR 6)

That the defendants had paid to themselves exorbitant salaries and large expenses without authority and approval by the Board of Fairview Development, Inc.

That the defendants had occupied apartments in Fairview Manor, rent free without authority and that the defendants had failed to account for and to pay to the corporation rents received.

The plaintiffs also allege in their complaint that the defendants have refused to abide by an agreement between the parties, entered into on June 16, 1950, whereby Cash Cole, Everett Nowell and Bayview

Realty, Inc., as parties of the first part and Cliff Mortensen, as party of the second part, agreed that Cliff Mortensen should have one vote as a director of Fairview Development, Inc., and that the defendants, Cash Cole and Everett Nowell, as directors should have one vote together and, further, that, in case of failure of the parties to agree, the matter should be submitted for decision to Kenneth Kadow or, in case he is not available, to Roy Sumpter of Seattle. (TR 15-20)

The plaintiffs pray the defendants, Everett Nowell and Cash Cole, be required to render full accounting, and for a temporary restraining order restraining these defendants from receiving and disbursing any funds of plaintiff, Fairview Development, Inc., and requiring the defendants to vacate their apartments, and further, that these defendants be removed from the management and operation of Fairview Manor.

The plaintiffs further pray for a temporary restraining order restraining the defendants, First National Bank of Fairbanks and Bank of Fairbanks, from disbursing any funds belonging to Fairview Development, Inc.

The plaintiffs also pray for an order, *pendente lite*, appointing a receiver. (TR 3-15)

In their answer the defendants, Cash Cole and Everett Nowell, deny these allegations, stating that they have at all times acted in the best interest of Fairview Development, Inc., and pursuant to agreement and lawful action by its Board of Directors. (TR 15-20)

The trial commenced on October 5, 1953, and included the taking of testimony of Cash Cole on direct examination as an adverse witness for the plaintiffs. On the evening of that day, however, Cash Cole suffered a severe heart attack which caused him to be confined to his bed for an extended period during which time he was suffering severe pain and was under doctor's care and, due to such pain and to various drugs administered by the physician which dilated his eyes and rendered him unable to read, Cash Cole was, during this period, mentally and physically unable to comprehend what was going on and to transact business.

At this time the following litigation was pending involving the several parties which had an important bearing on the present case:

A. G. Rushlight and Co. v. Nelse Mortensen-Alaska, Inc., Fairview Development, Inc., et al., Case No. 7163 in the District Court of Alaska, Fourth Division, to foreclose a mechanic's lien claimed by A. G. Rushlight against Fairview Manor in the sum of \$344,973.30 plus interest and attorneys' fees of \$35,000.00 and costs; in which proceeding *Pilip & Butt Painting Contractors* sought to foreclose their claim of mechanic's lien against Fairview Manor in the sum of \$77,681.62 with interest and attorneys' fees in the sum of \$5,000.00 and costs; and in which proceeding *C. H. Keaton dba Keaton Paint Company* sought to foreclose his claim of lien against Fairview Manor in the sum of \$17,339.44 plus interest, attorneys' fees and costs. (TR 69)

Nelse Mortensen-Alaska, Inc., et al. v. A. G. Rushlight & Co., Case No. 3105 in the District Court of the United States for the Western District of Washington, Northern Division. (TR 69-70)

Nelse Mortensen, Cliff Mortensen and Frank Henderson v. Pilip & Butt, Inc., Case No. 442,980 in the Superior Court of the State of Washington for King County. (TR 70)

Fairview Development, Inc. v. Nelse Mortensen-Alaska, Inc., Case No. 3532 in District Court of the United States for the Western District of Washington, Northern Division. (TR 70)

The trial was continued from day to day because of the severe illness of Cash Cole. *On October 8, 1953, Robert Sheldon was appointed receiver of Fairview Manor.* (Emphasis Supplied)

On October 9, 1953, under pressure by reason of the Court's having appointed a receiver and from other pressure shown herein, the stipulation here in controversy was executed by the parties. This stipulation provided, among other things: (a) For the sale of the common stock of Fairview Development, Inc., owned by the Mortensen group, to Cash Cole. (b) Release of all claims against Cash Cole and Fairview Development, Inc. by the Mortensen group in consideration of the payment by Fairview Development, Inc. of \$89,000.00. (c) Security for performance by deposit in escrow of all of the common stock, then owned and acquired by Cash Cole, such stock, in event of default, to become the property of the Mortensen

group. (d) Payment by the Mortensen group of \$6,800.00 to Nowell and dismissal of litigation involving this claim. (e) Assumption by the Mortensen group of liability for claims of mechanic's lien by Pilip & Butt Painting Contractors and C. H. Keaton. (f) Release to the Mortensen group of the \$8,800.00 held on deposit for landscaping in the National Bank of Commerce in Seattle. (g) Dismissal of all pending litigation with prejudice. (h) Resignation of Mortensen and Henderson as officers and directors of Fairview Development, Inc. (i) Agreement for no change in the corporate articles and by-laws and of no incurrance of unusual debts until the \$89,000.00 had been paid. (TR 38-44)

The negotiations terminating in the execution of this stipulation were conducted by Nicholas Jaureguay, attorney for Cash Cole and Bayview Realty, Inc., John Hedrick, attorney for Nowell, W. A. Rushlight as representative for A. G. Rushlight, Inc., Joe Diamond, Earle Zinn and Walter Sczudlo, as attorneys for the Mortensen group and Fairview Development, Inc. and other plaintiffs. (TR 235)

The son of Cash Cole was not present at any time during these negotiations after October 6, 1953, and had no knowledge of what was transpiring. (TR 133-134) Neither did Mrs. Ruth Cole take part in any of these negotiations. (TR 141) Cash Cole was, as previously mentioned confined to his bed with a severe heart attack and was physically and mentally incapable of transacting business, unable to read and unable to comprehend the nature or contents of the docu-

ment which he was persuaded to sign due to the representations of W. A. Rushlight purporting to act as a friend. (TR 57-58)

A final judgment approving the stipulation and settlement was entered by the Court on October 10, 1953 (TR 45-46) providing for the discharge of the receiver.

All this time and for some time thereafter Cash Cole, having suffered a severe heart attack, as before mentioned, was unable mentally and physically to transact business or to comprehend anything concerning this stipulation and settlement.

The signature of Cash Cole on this stipulation and on the collateral documents were procured by W. A. Rushlight who gained entrance into Cash Cole's bedroom while he was his house guest and posing as a friend, while Cash Cole was confined to his bed under the influence of certain drugs administered by Dr. Joseph M. Ribar and under orders by Dr. Ribar to have no visitors. (TR 65)

At the same time W. A. Rushlight induced Cash Cole to sign a demand note to A. G. Rushlight Company in the amount of \$25,000.00 without any consideration. (TR 57)

W. A. Rushlight did also, under the same circumstances, induce Cash Cole to execute an agreement to pay to Everett Nowell the sum of \$45,000.00, also without consideration. (TR 58)

Due to his illness Cash Cole did not ascertain the import and intent of the above mentioned stipulation,

demand note and agreement with Everett Nowell until about one month after the execution of these instruments. (TR 58)

Due to the fact that this stipulation and the collateral documents were obtained from Cash Cole at a time when he was mentally and physically unable to comprehend the import and consequences thereof, that these documents were confiscatory and that the conditions therein contained were impossible to fulfill, Cash Cole, as soon as he was able, filed on January 8, 1954 an amended answer to plaintiff's complaint and a motion to set aside and vacate the stipulation and the judgment based thereon. (TR 47-56)

This motion to set aside was accompanied by affidavits in support thereof from Cash Cole, his son, Tom Cole, and his physician, Dr. Joseph M. Ribar. (TR 56-66)

Affidavits in opposition were filed by Cliff Mortensen, Frank Henderson, Josef Diamond and Earle Zinn of Lycette, Diamond & Sylvester, Everett Nowell, one of the defendants herein who had been paid off pursuant to the stipulation (TR 38-44) and the collateral agreement in favor of Nowell. (TR 54) Also an affidavit by Dr. Ribar (TR 94-95) which in a slight degree contradicts his original affidavit. (TR 64-65)

On February 13, 1954 attorneys for the plaintiffs, Diamond, Zinn, and Sczudlo, filed a motion for the appointment of a receiver until the pending motion to set aside the stipulation and judgment based thereon had been heard and disposed of. (TR 101-103)

On February 23, 1954 Cash Cole, by his attorneys, Warren Taylor and Bell & Sanders, filed a cross complaint in this action, (TR 103-132) alleging therein that the plaintiffs, Nelse Mortensen, Cliff Mortensen and Frank Henderson, acting through their alter ego, Nelse Mortensen-Alaska, Inc., entered into a contract wherein they undertook to perform all the work and to furnish all the material in connection with the construction of Fairview Manor according to plans and specifications. That the Mortensen group, upon dissolution of Nelse Mortensen-Alaska Inc., assumed all of the responsibilities of the contract and the liabilities in connection therewith. That these plaintiffs obtained all of \$3,080,000.00 from the cross complainants, (TR 104) and that the plaintiffs failed to comply with the terms of the contract.

The cross complaint then sets out in detail all of the shortcomings and violations by the plaintiffs in connection with the contract, (TR 105-127) alleging that, by reason of these breaches of the contract the cross complainants have been damaged in the sum of \$1,214,431.00.

The cross complainants further allege that by reason of the plaintiffs having failed to comply with the terms of the contract, the cross complainants have been forced to spend, in doing what the plaintiffs were obligated to do, the sum of \$141,612.15.

As a second cause of action the cross complainants allege that the plaintiffs, during a period from April 1952 to October 1953, by various false affidavits and

representations, had obtained funds from banks in Seattle belonging to the cross complainants. That the plaintiffs had failed to pay the interest on the mortgage as it became due which they were obligated to do under the contract, and that hence, the cross complainants were forced to meet these payments. (TR 128-131)

Affidavits in support of the motion to set aside the judgment and in opposition to the appointment of a receiver were filed by Tom Cole, Ruth Cole, Cash Cole and Allene Hendricks on February 26, 1954 explaining in detail the events prior to and contemporary with this action. (TR 132-163)

Affidavits in opposition were filed by W. A. Rushlight, Everett Nowell, Cliff Mortensen and Frank Henderson on March 9, 1954. (TR 166-170 and 172-183)

On March 19, 1954 the plaintiffs filed an amended motion for the appointment of a receiver, alleging therein that the defendants, Cash Cole and Bayview Realty, Inc. were collecting rents and profits approximating \$31,000.00 to \$33,000.00 per month. That the property or rents were in danger of being lost and that the acts of the defendants were detrimental to the corporate and individual plaintiffs and that the property of the plaintiffs was in danger of being lost. (TR 183-187)

Affidavits in support of this motion were filed by Everett Nowell and Cliff Mortensen on February 19 and 20, respectively. (TR 187-194)

On April 2, 1954, Cash Cole filed an affidavit in opposition to the appointment of a receiver. (TR 195-214)

The honorable judge found that the defendants, Cash Cole and Bayview Realty Inc. had failed to sustain any ground under Rule 60(b) of the Federal Rules of Civil Procedure on which the Court could set aside or rescind the stipulation or vacate final judgment pursuant thereto. (TR 128-251)

On May 7, 1954 the judge therefore issued an order denying the defendants' motion to vacate final judgment, appointing a receiver and ordering delivery of the certificates of stock. (TR 252-258)

On June 10, 1954, defendant, Cash Cole, filed a motion to strike the name of Fairview Development, Inc. as party plaintiff. (TR 159-160) This motion was denied upon hearing on June 17, 1954.

Notice of appeal was filed by Bell & Sanders and Warren A. Taylor, attorneys for the defendants, on May 10, 1954. (TR 264)

An order was entered on June 4, 1954 setting an appeal cost bond at \$1,500.00 or, in lieu thereof, a supersedeas bond, first in the amount of \$150,000.00 then raised it to \$250,000.00. Also striking the name of Fairview Development Inc. from the notice of appeal.

ARGUMENT AND AUTHORITIES.**I.**

THE APPELLANTS CONTEND THAT THE COURT ERRED IN OVERRULING DEFENDANTS' MOTION TO SET ASIDE AND VACATE THE STIPULATION AND JUDGMENT BASED THEREON. (Points 1, 7(b), 7(c))

The motion to set aside and vacate the stipulation and judgment based thereon was made under Rule 60(b), Federal Rules of Civil Procedure which reads as follows:

“Rule 60 Relief from Judgment or Order

. . . (b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

. . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . .”

The stipulation on which the final decree and order, here in controversy, was based was filed on October 9, 1953. (TR 38) The final decree and order pursuant thereto was filed and entered on October 10, 1953. (TR 45) A motion to set aside and vacate the stipulation and judgment based thereon was filed by the Defendants Fairview Development, Inc., Bayview

Realty, Inc. and Cash Cole on January 8, 1954. (TR 52)

“The action of a trial court in either granting or refusing an application to vacate a judgment is, generally speaking, within the judicial discretion of the court. The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles.” *Assman v. Fleming*, 159 F2d 332, at 336.

The Honorable Judge, in his Findings of Fact, in connection with his denial of motion to set aside and vacate the stipulation and judgment based thereon, (TR 252) states, referring to events, subsequent to the first and only day of trial:

“... That evening he (Cash Cole) *purportedly* suffered a heart attack. . . .” (Findings of Fact No. 3, TR 231) (Emphasis added)

And further:

“On October 8, 1953 Robert E. Sheldon was appointed receiver in this cause for the Fairview Manor and all the assets of the corporate plaintiff, in view of the lack of any settlement on that date, the probable indefinite continuance of the trial and the *purported illness* of Cash Cole.” (Findings of Fact No. 4, TR 232) (Emphasis added)

The Appellants contend that these statements by the Court were reversible error.

The testimony throughout the proceedings was uncontradicted to the effect that Cash Cole did, in fact,

suffer a severe heart attack which caused him to be confined to his bed under the care of a physician for an extensive period.

In their motion to set aside the Appellants state as follows:

“That at the time the stipulation was executed the said Cash Cole was extremely ill, suffering from results of a heart attack which had confined him to his room and bed and incapacitated him to properly think and at a time he was being given drugs by a reputable physician to alleviate his physical suffering, and as a result thereof, he was unable to comprehend and did not know the meaning of said stipulation and signed said stipulation through mistake, inadvertence, surprise, excusable neglect and fraud practised by the prevailing parties.” (TR 53)

In his affidavit in support of the motion Appellant, Cash Cole reiterates the above statement and elaborates thereon and in addition states that W. A. Rushlight who was a house guest and who pretended to be a friend induced affiant to sign the said stipulation together with a demand note in favor of A. G. Rushlight Company and an agreement to pay \$45,000.00 to Everett Nowell while affiant was unable to comprehend the meaning of these documents. (TR 57-58)

Tom Cole, the son of Appellant, Cash Cole, makes similar assertions in his affidavit in support of the motion. (TR 61-64)

These sworn statements pertaining to the heart attack, suffered by Appellant Cash Cole, were further

supported by affidavits by Joseph M. Ribar, a reputable physician of Fairbanks, Alaska. (TR 64-65 and 94-95)

Dr. Ribar states in his affidavit in support of the motion as follows:

"... That affiant examined said Cash Cole and found his heart condition serious and immediately advised him that under no circumstances could he continue with the trial of the case in which he was a defendant and witness.

Affiant ordered said Cash Cole to remain absolutely quiet and remain in bed until he built up his strength.

That affiant administered drugs, to wit: Demerol, Elixir Donnatal and Aminophylline, Papaverine for the purpose of relieving the pain and relaxing the arteries to ease the strain on his heart.

One of the said drugs has a tendency to dilate the eyes so that vision is so distorted that reading is impossible." (TR 65)

Additional sworn statements to the effect that Appellant, Cash Cole, did, in fact, suffer a severe heart attack may be found in the affidavits in support of motion to set aside judgment and in opposition to motion for appointment of receiver by Cash Cole, (TR 143, at 148) Tom Cole, (TR 132 at 134) and Ruth Cole. (TR 140)

In contrast the Appellants submit that nowhere in the plaintiffs' motions or affidavits do there appear any statements or utterances in contradiction thereto.

The language employed in these several documents does not in any way attempt to deny the illness of Cash Cole.

Affidavit by Cliff Mortensen in opposition to set aside and vacate.

“... That the undersigned is informed and believes, *and upon such information and belief states the fact to be that that evening said Cash Cole suffered a heart attack, which* purportedly made him physically unable to continue with his testimony as a witness.” (TR 66, 26 70) (Emphasis added)

Affidavit by Frank Henderson.

“2. That the undersigned has examined and is familiar with the affidavit executed by Cliff Mortensen in opposition to said motion to set aside and vacate said stipulation and judgment based thereon, filed in this cause, *and by this reference does hereby adopt said affidavit and make the contents thereof a part hereof as if fully set out herein.*” (TR 86, 26 87) (Emphasis added)

Affidavit by Everett Nowell.

“... On or about October 5, following the first day of this matter, *your affiant was informed that Cash Cole had suffered an alleged heart attack.* ...” (TR 95, at 97) (Emphasis added)

Affidavit by W. A. Rushlight.

“... That on the evening of October 5, 1953 *your affiant was advised that Cash Cole had suffered a heart attack.*” (TR 166) (Emphasis added)

In spite of the fact that the severe heart attack suffered by Appellant, Cash Cole, was thus conclusively documented in the motion to set aside the judgment as well as in the several affidavits in support thereof, as quoted above, and in spite of the fact that none of the plaintiffs, nor Everett Nowell, nor W. A. Rushlight has at any time attempted to deny that Cash Cole did, in fact, suffer a severe heart attack, the Honorable Judge, in his Findings of Fact Nos. 3 and 4, states that Cash Cole "purportedly suffered a heart attack" and refers to Cash Cole's serious illness as a "purported illness", (TR 231, 232) thus casting a doubt on one of the main points on which the Appellants' motion to set aside the judgment rests.

Concerning the discretionary power of the court in deciding in favor of or against a motion to vacate a judgment or decree, the Appellants quote from *Freeman on Judgments*, V. I, Paragraph 292:

"Any doubt on the facts as to the propriety of setting aside a judgment should be resolved in favor of the application."

And from *Jergins v. Schenk*, 162 Cal. 747, 124 P 426:

"On an application to open a default, any doubt should be resolved in favor of the application; and, hence an appellate court will be less inclined to reverse an order granting, than one refusing, such an application."

Accord: *Humphreys v. Idaho Gold Mines Development Co.*, 21 Idaho 126, 40 LRA (NS) 817, 120 P 823.

Contrary hereto the Honorable Judge in the present case has created doubt where no doubt existed according to the evidence and has resolved this doubt in favor of the plaintiffs, and against the movant.

II.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 9 THAT CASH COLE TOOK PART IN THE NEGOTIATIONS MENTIONED IN SAID FINDING, WHEREAS THE ONLY MEDICAL TESTIMONY STATES THAT CASH COLE WAS A VERY SICK MAN AND THAT HE WAS SO ILL AT THE TIME OF THE EXECUTION OF THE STIPULATION, THAT HE COULD NOT READ BECAUSE MEDICINE GIVEN TO HIM DILATED HIS EYES AND THAT HE DID NOT KNOW THE INTENT AND IMPORT OF THE DOCUMENTS. (Points 7(e) and 7(g))

The Appellants quote from the Court's Findings of Fact No. 9:

“... Cash Cole participated in them (the negotiations) through his attorney, Jaureguy, and said Rushlight, *and the various compromise plans were submitted from time to time to him personally.*” (TR 236)

“Jaureguy, *Cash Cole* and Rushlight *gave careful consideration to the compromise plan...*” (TR 236)

“... The interests of these various groups in this case were adverse to each other, and each group, personally or through its attorneys, conducted the negotiations independently for its own benefit, without misrepresentation or opportunity for fraud, or attempt to overreach Cash Cole or any other parties involved for its own advantage *since all phases of said negotiations and propose*

settlement were known to each of said groups, and to Cash Cole, his son (Tom Cole), his wife and Jaureguy, his attorney who had full possession of all the facts and all of the corporate books of Fairview Development Inc. during this entire period." (TR 236-237) (Emphasis added)

These statements do not conform with the unequivocal denials and assertions contained in Appellants' motion to vacate the judgment and in the several affidavits in support thereof. The Honorable Judge has apparently taken the statements by the plaintiffs without analysis and has chosen to disregard the sworn statements by, or in behalf of, the Appellants; thus arbitrarily siding with the plaintiffs.

In support of these contentions the Appellants quote:

Motion to vacate the judgment, paragraphs (c) and (d).

"(c) That at the time the stipulation was executed the said Cash Cole was extremely ill, suffering from the results of a heart attack which had confined him to his room and bed and incapacitated him to properly think and at a time he was being given drugs by a reputable physician to alleviate his physical suffering, and as a result thereof, he was unable to comprehend and did not know the meaning of said stipulation and signed said stipulation through mistake, inadvertence, surprise, excusable neglect and fraud practised by the prevailing parties.

(d) That the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson acted by and through these agents, including, but not limited

to, the actions of Everett Nowell and W. A. Rushlight who pretended to be good friends of said Cash Cole, and Everett Nowell was an officer of the said corporation and took advantage of the sickened condition of Cash Cole and caused him to enter into said stipulation while sick in bed and unable to read and understand said stipulation and contents of said stipulation were falsely interpreted by the said W. A. Rushlight." (TR 53) Each of them coming out with great sums of money to be paid by Cash Cole, completely showing their adverse interest to Cash Cole.

Affidavit by Cash Cole.

"That affiant was administered certain drugs or medication that affected his eyes to such an extent that he was unable to see, and while in such condition, was prevailed upon to execute the stipulation filed in the above-entitled cause on the 9th day of October 1953.

That while confined to his bed and unable to read, the plaintiffs, acting in concert with one W. A. Rushlight, who was a house guest of affiant and who pretended to be a friend of affiant, induced affiant to sign said stipulation, said affiant not knowing the contents and import of said stipulation, and relied upon the statements of said A. G. Rushlight Company (sic) to the contents thereof which were false and fraudulent." (TR 57)

Affidavits by Tom Cole.

"... At the time the negotiations were going on, no persons were allowed to visit Cash Cole who was confined to bed with a severe heart at-

tack and was taking drugs which dilated his eyes to such an extent that he could not read, and had to depend upon what was told him by Dick Rushlight . . .” (TR 134)

“ . . . That for three or four days no one was admitted to see Cash Cole, except affiant, Mrs. Cole and Dr. Ribar, and at no time during this period was any business discussed, as Cash Cole was an extremely sick man, and was not physically or mentally able to do so. Affiant was advised by Dr. Ribar to this effect and it was also very apparent to affiant.” (TR 135)

“ . . . That Cash Cole was unable to read the said instruments for a week after the execution of the same. That no person was ever in the bedroom of Cash Cole long enough to have read the stipulation, agreements and note to him.” (TR 137)

“ . . . That the said W. A. Rushlight, at the time of the execution of the said documents and instruments, well knew that said Cash Cole was in no condition, physically or mentally, to execute the same, and that said Cash Cole did not comprehend the intent and import of said instruments.” (TR 62-63)

Affidavits by Joseph M. Ribar, M.D.

“ . . . Affiant ordered said Cash Cole to remain absolutely quiet and remain in bed until he built up his strength.

That affiant administered drugs, to wit: Demerol, Elixir Donnatal and Aminophylline, Pavarine for the purpose of relieving the pain and relaxing the arteries to ease the strain on his heart. One of said drugs has a tendency to dilate

the eyes so that vision is so distorted that reading is impossible.

Affiant ordered Cash Cole to have no visitors until he had recovered some of his strength.

It is the opinion of affiant that at no time within one week after said heart attack was Cash Cole in a proper physical or mental condition to transact business matters." (TR 65) (Emphasis added)

"That it is the opinion of the affiant that at no time within one week after said heart attack was Cash Cole in a proper physical or mental condition to transact business matters, but I am unable to state whether or not he was mentally competent to transact any business matters after the expiration of seventy-two (72) hours following his attack, that is, after October 7, 1954 (sic), since the patient was not examined to determine his mental competency." (TR 94) (Emphasis added)

These statements are all in accord to the effect that Appellant, Cash Cole was completely unable to transact business in the period during which the negotiations took place and for quite some time after that of the execution of the stipulation.

The only weakness appears in Dr. Ribar's last affidavit, which was procured and filed by plaintiffs, quoted above. (TR 94) It is hard to understand the meaning of this, as Dr. Ribar contradicts himself in his statements contained in the third paragraph thereof. In the first part of this paragraph he states that Cash Cole was physically and mentally unable to

transact business within one week after his heart attack, and in the last part he says that he is unable to state whether or not Cash Cole was mentally competent after the expiration of 72 hours, "as the patient was not examined to determine his mental capacity."

This should, however, not throw any great doubt on the true condition of Cash Cole in view of Dr. Ribar's other statements and of the statements contained in the motion to vacate judgment and in the other affidavits quoted above.

The plaintiffs have presented no testimony contrary to this by any competent physician and rely, in their denials, entirely on their own opinions, some of which are admittedly based on "information and belief" only, while others expressly disclaim any knowledge as to this matter.

Affidavit by Cliff Mortensen.

"... The undersigned is informed and believes and upon such information and belief states the fact to be that prior to the execution of said stipulation by said Cash Cole it had been discussed with him in his room at Fairview Manor with any one or more of the following persons and in their presence . . ." (TR 74-75) (Emphasis added)

Apparently, without any knowledge of his own, as indicated by the above quotation, Cliff Mortensen states:

"There was no fraud or conspiracy practised or attempted by the plaintiffs or any of them or the

defendant, Everett Nowell or Dick Rushlight, or any one or more of the parties to this cause . . .” (TR 80-81)

“The interests of these various groups in this case were adverse to each other and each group personally or through its attorneys conducted the negotiations independently for its own benefit and without any misrepresentation with respect to any proposed compromise plan, or opportunity for fraud, or to overreach Cash Cole or any other of the parties involved for its own advantage, since all phases of said negotiations and proposed settlement were known to each of said groups, and especially to said Cash Cole, his son, his wife and his attorney, who had full possession of all the facts and all of the corporate books of Fairview Development, Inc. during this entire period.” (TR 81)

Plaintiff, Frank V. Henderson, in his affidavit merely adopts Cliff Mortensen’s affidavit containing the statements quoted, (TR 87) as do attorneys Joseph Diamond and Earle Zinn. (TR 93)

The Defendant, Everett Nowell, in his affidavit, disclaims any knowledge concerning the condition of Cash Cole:

“From the time that Cash Cole left the Courtroom on October 5, 1953, to the present date, your affiant has not seen, talked to, communicated with, or in any manner had any contact whatsoever with Cash Cole.” (TR 97)

“ . . . How Cash Cole’s signature was obtained your affiant has no knowledge.” (TR 99)

Affidavit by W. A. Rushlight.

“ . . . Contrary to the statements contained in the affidavits of Cash Cole and Tom Cole and in the motion, not only was Cash Cole fully aware of what was going on, but understood each and every matter contained in said stipulation and all ancillary matters . . . ” (TR 170)

On these weak denials the Honorable Judge relies in spite of the conclusive statements by the Appellants to the contrary, some of which statements were given by the only reputable physician familiar with Cash Cole's condition.

It should be noted that the Honorable Judge uses the statement contained in Cliff Mortensen's affidavit (TR 81) verbatim (TR 236-237) as quoted above, in spite of the fact that Cliff Mortensen's knowledge of these matters is, by his own admission, based only upon information and belief. (TR 74-75)

Here again it appears that the doubt, if any, has been resolved in favor of the plaintiffs contrary to the rules as quoted above. *Freeman on Judgments*, V. I, paragraph 292; *Jergins v. Schenk*, 162 Cal. 747, 124 P 426. *Humphreys v. Idaho Gold Mine Dev. Co.* 21 Idaho 126, 40 L.R.A. (NS) 817, 120 P 823. Actually there is no doubt according to the evidence, but virtual certainty that Appellant, Cash Cole, was during the pertinent period, in no condition, physically or mentally, to transact business, and that he did not know the import of the documents which he was imposed upon to sign.

Appellants also submit that W. A. Rushlight, in his affidavit, admits that Cash Cole was unable to read during the period of the negotiations and the execution of the agreement:

“... The more important provisions were read to him in full and the rest were fully explained. . . .” (TR 169)

There would have been no need of reading some of the provisions to Cash Cole and to explain the rest, had he been able to read himself and to comprehend. It is further contended by the Appellants that two of the most important points in the stipulation were probably left unexplained: (1) That the payments offered to Cash Cole by the plaintiffs were to be made by the year while the stipulation provided that these payments had to be made by Cash Cole to the Mortensen group on a quarterly basis; (2) Nothing was explained to Cash Cole about the placing of the stock in escrow.

III.

APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 9, IN THAT THE TESTIMONY SHOWED THAT TOM COLE, RUTH COLE AND JAUREGUY DID NOT PARTICIPATE IN THE NEGOTIATIONS MENTIONED IN SAID FINDING. (Point 7(f))

The Appellants quote from the Court's Findings of Fact No. 9:

“... The negotiations for settlement were conducted by *Nicholas Jaureguy, as attorney for Cash Cole* and Bayview Realty Inc.; John Hed

rick, attorney for Everett Nowell; W. A. Rushlight, acting as representative for A. G. Rushlight & Co.; Joe Diamond, Earle Zinn and Walter Sezudlo, attorneys for Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, and Fairview Development, Inc., and other plaintiffs.” (TR 235) (Emphasis added)

The Appellants also refer to excerpts from the Court’s Findings of Fact No. 9, quoted above. (Appellants’ contention No. II)

In support of Appellants’ contention, that the evidence conclusively points to the opposite conclusions, Appellants quote:

Affidavits by Tom Cole.

“ . . . That at no time was affiant’s wife or son, Tom Cole, informed of the matters discussed in the negotiations leading to the execution of the said documents, nor did his attorneys talk with him during said negotiations.” (TR 60)

“ . . . That Nicholas Jaureguy did not work out the settlement . . . ” (TR 157)

“ Mr. Jaureguy, who represented affiant, did not make the settlement, but advised affiant before he left Fairbanks that it had been done upon the advice of Mr. Cake to Dick Rushlight and that Cake had also advised Rushlight to get possession of Fairview Manor without fail . . . ” (TR 162-163)

Affidavits by Tom Cole.

“ . . . Affiant has read the affidavit of Cliff Mortensen, and in reference to statements contained therein, *denies that affiant was present at*

any conference regarding the settlement of the above entitled cause after the 6th day of October 1953, and had no knowledge of what was transpiring, as Dick Rushlight was doing all the negotiating with the attorneys for plaintiffs, as a purported friend of Cash Cole . . .” (TR 133-134) (Emphasis added)

“ . . . Affiant further states that neither he nor Mrs. Cash Cole had any appreciable knowledge of the contents of the instruments signed by Cash Cole . . .” (TR 137)

Affidavit by Ruth Cole.

“ . . . That affiant or Tom Cole took no part in said negotiations nor were they present when Rushlight was talking with my husband over a period of several days . . .” (TR 141) (Emphasis added)

“ . . . That affiant did not, nor did Tom Cole, participate in the negotiations which led up to the execution of the documents hereinbefore mentioned.” (TR 142) (Emphasis added)

In contrast hereto the several affidavits by, or in support of, the plaintiffs contain the following:

Affidavit by Cliff Mortensen.

“ . . . Such negotiations were commenced in the jury room adjoining the courtroom on the morning of October 6. There were present at that time said Nicholas Jaureguy, said John E. Hedrick, Tom Cole, the son of Cash Cole, said Everett Nowell, Dick Rushlight, Cliff Mortensen, Frank Henderson, Joe Diamond, Earle Zinn, Walter Sezudlo and one or two other persons who thereafter from time to time and in various other

places participated in said negotiations until they were concluded . . .” (TR 71)

“ . . . *The undersigned is informed and believes and upon such information and belief states the fact to be that prior to the execution of said stipulation by said Cash Cole it had been discussed with him in his room at Fairview Manor with any one or more of the following persons and in their presence: Tom Cole, his son, Mrs. Cash Cole, his wife and Dick Rushlight.*” (TR 74-75) (Emphasis added)

“ . . . The negotiations for settlement above mentioned were conducted by Nicholas Jaureguy, attorney for Cash Cole and Bayview Realty, Inc. . . .” (TR 80)

“ . . . but careful consideration was given by Nicholas Jaureguy, attorney for Cash Cole and ultimately Cash Cole himself . . .” (TR 81)

“ . . . since all phases of said negotiation and proposed settlement were known to each of said groups and especially to said Cash Cole, his son, his wife and his attorney who had full possession of all of the facts and all of the corporate books of Fairview Development, Inc. during this entire period.” (TR 81)

Frank V. Henderson, in his affidavit, adopts the affidavit of Cliff Mortensen containing the above quoted statements, (TR 87) as do the attorneys for the plaintiffs, Josef Diamond and Earle Zinn, in their affidavit. (TR 93)

Affidavit by Everett Nowell.

“ . . . *During the same period of time your affiant, John Hedrick, W. A. Rushlight, Nicholas Jaureguy carried on the negotiations to sell to Cash Cole affiant's interests and claims in Fairview Development, Inc. . . .* The originals and copies of these contracts and releases were given to Nicholas Jaureguy to obtain the signature of Cash Cole. They were returned to your affiant with Cash Cole's signature thereon. How Cash Cole's signature was obtained your affiant has no knowledge . . .” (TR 99) (Emphasis added)

Affidavit by W. A. Rushlight.

“ . . . *Accordingly during the course of that day negotiations were carried on by your affiant and Mr. Jaureguy on behalf of Cash Cole and also by Everett Nowell and his attorney, John Hedrick, with the plaintiffs seeking an offer from them to purchase all of the interests of Cash Cole and Everett Nowell in said project . . .*” (TR 167) (Emphasis added)

“ . . . *However, on Friday morning, October 9, when the proposed stipulation had been reduced to writing in its entirety, Mr. Jaureguy and your affiant went to Cole's bedroom and there explained all the provisions of the stipulation. The more important provisions were read to him in full and the rest were fully explained. He and his wife, Ruth Cole, agreed to all the terms thereof and signed it . . .*” (TR 168-169) (Emphasis added)

Affidavit by Cliff Mortensen and Frank Henderson.

“ . . . *That Tom Cole was present and actively participated in the various negotiations leading*

up to the settlement; that, as conceded in said affidavit by Tom Cole, Tom Cole read and was thoroughly conversant with the stipulation which was later executed by Cash Cole and filed herein on October 9, 1953; that the affidavit of Tom Cole is inconsistent in that it states in paragraph 2, Page 4, 'Affiant further states that neither he nor Mrs. Cole had any appreciable knowledge of the contents of the instrument signed by Cash Cole . . . ' while in paragraph 2 on page 2, the following statements appear ' . . . and affiant advised Dick Rushlight after negotiations were completed that it was utterly impossible to purchase Mortensen's, Henderson's and Nowell's stock on the terms set forth in the agreements. . . . ' 'Affiant also informed Mr. Jaureguy, one of Cash Cole's attorneys, that the terms of the agreement were impossible of fulfillment . . . ' ' (TR 181)

All of the affidavits by, or in behalf of, the Appellants emphatically deny that Tom Cole or Mrs. Cole participated in or had knowledge of what transpired during the negotiations.

The statements by, or in behalf of, the plaintiffs, on the other hand, are far from clear. Cliff Mortensen's affidavit is quite emphatic to the effect that both Tom Cole and Nicholas Jaureguy were present during the first day of the negotiations, but is somewhat vague as to who were present upon subsequent occasions. (TR 71) He states further that Jaureguy conducted the negotiations in behalf of Cash Cole, but does not mention Tom Cole in this respect. (TR 81) Finally he claims that all phases of said negotiations were

known to each of said groups, especially to Cash Cole, his son, his wife, and his attorney.

Frank Henderson and Josef Diamond and Earle Zinn adopt these statements in their affidavits, while Everett Nowell, in contrast, makes no statement as to these negotiations at all, but only claims to have knowledge of negotiations to "sell to Cash Cole affiant's interests and claims in Fairview Development, Inc." which negotiations can, at best, be considered only collateral to the negotiations leading to the settlement.

W. A. Rushlight does not claim that Tom Cole or Ruth Cole were present during the negotiations, not even during the first day, which conflicts with Cliff Mortensen's statements. (TR 167)

Cliff Mortensen and Frank Henderson finally get together to claim that Tom Cole actively participated, but there is still no mention of Mrs. Cole. (TR 181)

These plaintiffs also claim that Tom Cole, in his affidavit, conceded that he had read "and was thoroughly familiar with the stipulation" and that Tom Cole was inconsistent in his statements in that he, in one paragraph, states that neither he nor Mrs. Cole had any appreciable knowledge of the contents of the instrument, while he, in another paragraph, states that he advised Dick Rushlight and Jaureguy to the effect that it was utterly impossible for Cash Cole to meet the terms of the stipulation. (TR 180) The Honorable Judge, in his Findings of Fact No. 11 (TR 237-238) adopts this view, stating further:

“11. Cash Cole contends that his wife and Tom Cole were uninformed of the matters discussed and the final stipulation. In his latter affidavit he points out discussions between Tom Cole and W. A. Rushlight in which familiarity with the terms of the stipulation are shown by the former. Tom Cole denied participation in the negotiations, but admitted that he talked to W. A. Rushlight and to Jaureguy, attorney for Cole, about the final settlement agreement. He does not deny in his affidavits lack of knowledge as to the terms and conditions of the final settlement represented in the stipulation. Ruth Cole denies participation in the negotiations, but does not deny knowledge of the final settlement terms, but rather indicates that she did possess such knowledge.” (TR 237-238)

Upon proper analysis there is no conflict in the statements of Tom Cole or Ruth Cole. On the contrary, it would be surprising if neither one of these, even without having participated in the negotiations, would not have gained a broad knowledge of the terms at least enough to realize the impossibility of performance. This does not in any way admit of participation or of anything more than a rough knowledge of the broad outlines of the agreement, the details of which they learned about after the stipulation had been signed.

The Appellants contend that the conflicting representations are to be found, rather, in the statements by, or in behalf of, the plaintiffs, as pointed out above.

IV.

APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT THAT CASH COLE HAD FAILED TO DEPOSIT THE FAIRVIEW DEVELOPMENT, INC. STOCK IN ESCROW AS REQUIRED BY THE STIPULATION AND AGREEMENT. (Point 7(d))

The Honorable Judge, in his Findings of Fact No. 18, states:

“18. The settlement agreement contained in the stipulation (par. 2, 9) provided that all of the capital stock of Fairview Development, Inc., (except the 100 shares of preferred stock) consisting of 450 shares purchased by said Cash Cole, Nowell and/or Bayview Realty, Inc., from the Mortensens and Henderson under said agreement, and the 450 shares of stock owned by Bayview Realty, Inc., would be placed in escrow, as security for the payment of the sum of \$89,000.00 to the Mortensens and Henderson undertaken by Fairview Development, Inc. . . . Cash Cole, Nowell and Bayview Realty, Inc., failed to deliver said stock in escrow for the purpose of said security.” (TR 244)

And in Findings of Fact No. 20.

“20. Bayview Realty, Inc. Cash Cole and Nowell have defaulted under the stipulation and settlement agreement in the performance of the terms and conditions thereof, including (a) failure to deposit all the capital stock of Fairview Development, Inc. (except 100 shares of preferred stock), aggregating 900 shares theretofore owned by said defendants or one or more of them, or acquired under the terms of the settlement agreement, as security for the payment of

the obligation of \$89,000.00 undertaken by Fairview Development, Inc. . . ." (TR 245)

In his affidavit in opposition to the motion to vacate the judgment the plaintiff, Cliff Mortensen states that Cash Cole, Everett Nowell and Bayview Realty, Inc. have refused and failed to deliver said stock in escrow, (TR 78) and states further:

" . . . but it was specifically provided that the defendants, Cash Cole, Everett Nowell and/or Bayview Realty, Inc. would secure performance of said undertaking by pledge of all of the stock of said Fairview Development, Inc., as hereinabove stated and more fully set out in said stipulation" (TR 78-79)

This, the plaintiffs well knew, was a clause impossible of performance, inasmuch as the stock in question was already being held in escrow by Roy Sumpter of Seattle, Washington, a fact which was also well known to the Honorable Judge.

From the affidavit of Appellant, Cash Cole, it may be seen that the plaintiffs also failed to comply with this part of the stipulation as their stock was likewise being held in escrow by said Roy Sumpter:

" . . . When the stipulation was signed, the stock was supposed to be turned over to Cash Cole, as the President of Fairview Development, Inc., but although repeated demands have been made for said stock, plaintiffs have protested delivery of said stock to Cash Cole, which stock has heretofore been held in escrow by Roy Sumpter, of the Washington Mortgage Company, Central Building, Seattle, Washington. That when Cash Cole

requested said Roy Sumpter to deliver the stock to him, Josef Diamond, attorney for the plaintiffs, objected although the escrow under which said stock was held had ended, and Cash Cole's stock should have been delivered to him.

Furthermore, Cash Cole was not bound to deliver the stock to plaintiffs, when he ascertained that he had been induced to sign the instruments and note while unable to comprehend the import of said documents." (TR 135-136)

Statements to this effect may also be found in Tom Cole's affidavit:

"... This stock was placed in escrow, to be delivered when the project was successfully completed; and to date the contract has not been completed, as set forth in the cross complaint on file herein." (TR 160-161)

"... Mortensen's attorneys have kept the holder of the escrow stock from ever delivering said stock, thereby failing to perform their part of the agreement..." (TR 161)

It should be noted that Roy Sumpter was holding the stock in question under an escrow agreement which provided that the stock should be released when the project was completed. Proof of the completion of the project could only be by a letter of acceptance from the FHA and a resolution by the Board of Directors of the corporation. The Mortensen group are not in possession of either instrument, nor to the knowledge of the Appellants have these instruments ever been issued. Roy Sumpter released the stock illegally and this Court had no jurisdiction to order

the release of this stock, nor could it cancel or nullify the original provisions under which Sumpter was holding the stock. It is difficult to understand how Cash Cole could be expected to deliver stock in escrow, pursuant to the agreement, which stock was not in his possession and was being kept from his possession by the plaintiffs.

V.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 15, 16 AND 17 IN THAT THE LITIGATION DEALT WITH THEREIN WAS NOT A VALID CLAIM AGAINST FAIRVIEW DEVELOPMENT, INC., BUT WAS, IN FACT, OBLIGATIONS OF THE OTHER PLAINTIFFS. (Points 7(i), 7(j), 7(k))

In its findings of Fact No. 17 the Court lists the following additional litigations:

A. G. Rushlight & Co., a corporation, v. Nelse Mortensen-Alaska Inc. a corporation, Fairview Development, Inc. et al., No. 7163.

Nelse Mortensen-Alaska, Inc., a corporation, et al., v. A. G. Rushlight & Co., a corporation, No. 3105.

Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners dba Nelse Mortensen-Alaska Co., et al., v. Pilip & Butt, Inc., a corporation, et al., No. 44280.

Fairview Development, Inc., a corporation, v. Nelse Mortensen-Alaska, Inc., No. 3532. (TR 243)

In case No. 7163 the following claims of mechanic's and materialman's liens had been filed:

A. G. Rushlight & Co. Inc.—Claim, \$344,973.30; attorneys' fees \$35,000.00 and costs.

Pilip & Butt Painting Contractors, Inc.—Claim, \$77,681.62 and interest accrued thereon; attorneys' fees, \$5,000.00 and costs.

C. H. Keaton, dba Keaton Paint Co.—Claim, \$17,349.44, and interest accrued thereon; attorneys' fees, \$2,000.00, and costs. (TR 242)

Concerning this litigation the Court states in its Findings of Fact No. 15:

“15. Cash accepted the benefit of the performance of the terms and conditions of the settlement agreement by the Mortensens and Henderson resulting in the dismissal of the various litigations hereinafter mentioned, payment by them of \$125,000.00 to A. G. Rushlight & Co., in case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Contractors, Inc., and release and settlement of other conflicting claims. No restitution has been offered by Cash Cole and Bayview Realty, Inc., or others in their behalf, to place the parties in the same position as they were at the time of the filing of said stipulations on October 9, 1953.” (TR 241-242)

If any debts were paid they were the debts of the Mortensens and due under the terms of the contract to be paid by them.

The Appellants contend that the claims involved in the litigations listed above were not valid claims against Fairview Development, Inc., but were obligations of the Mortensen group pursuant to the contract

of July 10, 1950 entered into on that date by the said group and Fairview Development, Inc. (TR 22-23)

These claims, with the attendant litigation, are also listed in the affidavits of Cliff Mortensen, wherein it is clearly stated that said claims concern mechanic's liens by sub-contractors the liability in connection with payment of which would ultimately rest on the Mortensen group. (TR 69-70)

The stipulation, among other things, provided for the payment to the Mortensen Group of \$8,800.00 held by the National Bank of Commerce, Seattle, Washington. (TR 41 and 233)

This money was held in escrow by said bank to assure performance under the original contract, (TR 22-23) with respect to landscaping and planting.

The uncontradicted evidence shows that this landscaping was, in fact, never done.

Letter from J. F. Campbell. (Tr. 34-35)

Appellants' Cross Complaint, Second Cause of Action, Paragraph III.

"Thereafter, and sometime after the 9th day of October, 1953, the said Nelse Mortensen, Cliff Mortensen and Frank V. Henderson fraudulently, and through false representation did draw from a bank in Seattle \$8,800.00, lawful money of these cross complainants, which money represented the contract price due for landscaping of said apartments when, in truth and in fact, each of the parties, Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, knew that the landscaping had not been done and no part thereof had been

done, and therefore wrongfully and fraudulently obtained \$8,800.00 from the cross complainants, which money belonged to them; . . .” (TR 129)

Statements to the same effect may be found in affidavits by Appellant, Cash Cole. (TR 144-145 and 157) These statements have at no time been denied by the plaintiffs.

VI.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 1, THAT THERE WAS DISSENSION AND DISCORD AS TO WHO, IN FACT COMPRISED THE DIRECTORATE; THAT THERE WAS IMPROPER DISPOSITION OF CORPORATE FUNDS, IMPAIRMENT OF CORPORATE PROPERTY, USURPATION OF CONTROL AND EXERCISE OF CORPORATE POWERS WITHOUT AUTHORITY. (Point 7(a))

The Appellants contend that there is no evidence to the effect that there was “dissension and discord as to who, in fact, comprised the directorate”. On the contrary, the evidence clearly shows that it was at all times entirely clear who comprised the directorate and none of the parties had any doubt thereof.

There was a question as to certain actions by the plaintiff, Cliff Mortensen who, according to Cash Cole, signed his name as president of Fairview Development, Inc. in spite of the fact that Everett Nowell was, up to the time of the execution of the stipulation, the duly elected president.

Affidavit by Cash Cole.

“ . . . That Cliff Mortensen signed any and all papers that he saw fit as president, and that

Nowell, at no time did anything to affirm his right and duty as president, notwithstanding the fact that affiant protested such procedure to him in front of his attorneys. To the last Cliff Mortensen signed his name as president of the corporation to the final papers releasing all of Fairview's security money for completion of the contract, yet Nowell, as the regularly elected president of the corporation, did nothing to nullify such action" (TR 154-155)

This has not at any time been denied by the plaintiffs and it was expressly admitted by the defendant, Everett Nowell, while denying that he had failed to take steps to stop Cliff Mortensen from signing his name as President.

"That your affiant, Everett Nowell, repeatedly took action to stop Cliff Mortensen from signing any papers as president of Fairview Development, Inc." (TR 176)

This action on the part of Cliff Mortensen could not in any way be construed to show "dissension and discord as to who comprised the directorate" and nowhere in the record does there appear any statement casting any real doubt with respect to the composition of the Board.

There is, in one of Cliff Mortensen's affidavits, a passage which could be construed to state a claim by said Cliff Mortensen that Nelse Mortensen and Frank Henderson were also directors in Fairview Development, Inc.:

"1. That he is one of the plaintiffs in the above entitled cause, and that said cause was filed by

Fairview Development, Inc., an Alaska corporation; Nelse Mortensen, the undersigned and Frank V. Henderson, individually and as Directors and stockholders of Fairview Development, Inc. . . ." (TR 66-67)

First, it is doubtful if Cliff Mortensen, by this passage, meant to claim that Nelse Mortensen and Frank Henderson were Directors of Fairview;

Second, this claim, if so it is, has been expressly denied by Cash Cole, who points out that no real doubt as to the falseness of this claim could have existed in the minds of the plaintiffs inasmuch as the minutes of the corporation are plainly explicit as to this matter.

Affidavit by Cash Cole.

"Affiant further states, in reply to the affidavit of Cliff Mortensen, on file herein, that the statement in paragraph I of said affidavit are untrue. (sic) *That Frank Henderson and Nelse Mortensen are not and have never been directors of Fairview Development, Inc. as may be verified by the corporation's minute book. . . .*" (TR 159-160) (Emphasis added)

As to the statement of the Court to the effect that there was "improper disposition of corporate funds", the Appellants contend that this is wholly an arbitrary finding by the Honorable Judge and that the preponderance of evidence points toward a contrary conclusion.

In the plaintiffs' complaint numerous allegations are set forth concerning alleged misdeeds on the part

of the defendants in the handling of the corporate funds and the corporate property and to the effect that the defendants allegedly usurped control and possession and that they exercised corporate powers without authority of the Board.

These allegations the defendants deny in their answer, and it is submitted that, inasmuch as the trial was never carried beyond the first day and that, consequently the defendants never had an opportunity to present their case and for cross examination these statements stand merely as unproven allegations, and Appellants contend that it was reversible error by the Honorable Judge to adopt said allegations as facts.

An analysis of the Transcript bears out this contention and the evidence contained therein leaves little doubt with respect thereto.

According to affidavit by Cash Cole a contract was entered into by the defendants and the Mortensen group wherein it was agreed that, upon completion of Fairview Manor, Bayview Realty should have the operation and management of said housing project Bayview Realty being a corporation owned by the defendants, Cash Cole and Everett Nowell. (TR 24) This contract was ratified on August 3, 1951 by resolution of the Board of Directors of Fairview Development, Inc. which was, then and up to the time of the execution of the stipulation, comprised of Everett Nowell, Cash Cole and Cliff Mortensen, and an agreement pursuant to this resolution was executed by and between Bayview Realty, Inc. and Fairview Development, Inc. (TR 25)

In said resolution and agreement pursuant thereto Bayview Realty was to receive a fee of five percent of the total income of Fairview Development, Inc. with a minimum guarantee of \$2,000.00 per month plus all expenses incurred. (TR 25)

According to affidavit by Appellant, Cash Cole, a firm of certified public accountants was retained through action of the Board of Directors of Fairview Development, Inc. and one of the members of the firm, Herbert Lofquist, himself a certified public accountant, set up an accounting system that has been followed ever since. (TR 26-27)

Defendants, Cash Cole and Everett Nowell, managed the project and received their salaries as per action of the Board of Directors, (TR 25) but on January 1, 1953 Everett Nowell took himself off the payroll as drastic economies were necessary, after which time Fairview Development, Inc. paid less than the \$2,000.00 per month agreed upon. (TR 25)

Cash Cole and Everett Nowell occupied apartments in the project which was necessary for the proper management. (TR 28)

As to the allegations by the plaintiffs that the defendants were guilty of the impairment of corporate assets which allegations the Honorable Judge has accepted as facts, a fully satisfactory explanation may be found in the several affidavits and statements by, or in support of, the defendants.

The Mortensen group, according to the contract of July 10, 1950, assumed the liabilities and responsi-

bilities for the construction of the project. The Mortensen group, however, failed to meet these liabilities (TR 29 et seq.) and further failed to complete the construction of said project according to terms and specifications. (TR 29-30)

Appellant, Cash Cole, states:

"18. That in spite of the inadequacies of the construction by the plaintiffs herein individually and further in spite of the fact that they have received the entire \$3,080,000.00 for the construction of the project and have failed to pay substantial sums of money required by them to be paid, the management of this project has been carried on in a remarkably efficient and proper manner; in substantiation of this attached hereto is a copy of a letter directed to Fairview Development, Inc., and by this reference made a part hereof. This letter is from J. C. Campbell, Vice-President and manager Mortgage Loan Department, Seattle Trust and Savings Bank, who is servicing the underlying mortgage on the project for Institutional Securities Corporation of New York. One paragraph of the attached letter should be emphasized as follows:

'First I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appeared staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face one cannot help but admire the management's approach to its problems and its will and determination to correct the deficien-

cies that have developed, for the preservation and continued operation of the project.' '' (TR 30-31)

This letter part of which has been quoted above is set out in full in the Transcript on pages 33 to 37, incl.

The Appellants request that the Honorable Court read carefully the defendants' cross complaint wherein the deficiencies in construction have been documented in detail, (TR 103-131) and affidavits by Cash Cole explaining in detail the problems with which the managers of the project were faced. (TR 143-163) The Appellants further refer to affidavit by Allene Hendricks, bookkeeper for Fairview Manor. (TR 171-172)

The records show that \$140,000.00 of capital improvements were made and that all operating expenses were paid to date in a period of 21½ years of operation.

These several statements concerning the management of Fairview Manor and the expenditure of funds of Fairview Development, Inc. have never been adequately refuted by the plaintiffs. These plaintiffs have limited themselves to mere allegations and accusations without any attempt of documentation or proof. But in spite thereof the Honorable Judge arbitrarily has taken the point of view of the plaintiffs. In spite of the fact that the plaintiffs have been unable to document their denials of the defendants' statements concerning deficiencies in the construction

as shown in the affidavit by Cliff Mortensen and Frank Henderson, (TR 177-178) the Honorable Judge states as follows:

“22. The defendants, Cash Cole and Bayview Realty, Inc., have reiterated claims upon which the suit herein before mentioned . . . was based . . . It was based on excessive and unreasonable claims involving purported defects in construction which actually resulted from defective plans and specifications prepared by an architect selected by Cole, and from changes connected with the progress of construction, which were required and authorized by the plaintiff corporation. . . .”
(TR 246)

This, the Appellants submit, is a mere statement of opinion arrived at in an arbitrary manner in the teeth of detailed documentation by the defendants and without any semblance of adequate proof on the part of the plaintiffs.

There is nothing any place in the record to show that Cash Cole selected the original architect. It must be kept in mind that there were two different architects concerned with the project; Jerry Fields, the original architect accepted by the Mortensen group and not known by Cole at the time of the acceptance, and the other architect, Jesse Warren, who was employed by Cole on behalf of Fairview Manor to make an investigation of the project as to its completion according to plans and specifications. The plaintiffs have attempted to picture Warren as the man who drew the original specifications while the fact is that

he was the man who wrote the report contained in the cross complaint. (TR 132-33)

As for the statement that the defendants exercised corporate powers without authority of the Board, this also is based on completely undocumented charges, and contrary to the corporation's records.

In their complaint the plaintiffs state as follows:

"XII. That the defendants, Cash Cole and Everett Nowell, in violation of said agreement have attempted to act for or on behalf of the plaintiff corporation without any authority or right whatsoever, . . . Said defendants have failed and refused to submit matters which could not be settled by the Board of Directors of plaintiff corporation to Ken Kadow, but have entirely ignored the Board of Directors and the stockholders of said corporation. Said defendants, Cash Cole and Everett Nowell, have usurped the authority and powers of the plaintiff corporation and have failed and neglected to call or hold any annual meeting of the stockholders as required by the by-laws of the corporation." (TR 9-10)

The Appellants submit that the minutes of Fairview Development, Inc. show that the required meetings were held and that the defendants acted upon proper authority.

As to failure on the part of the defendants to submit matters on which the Board could not agree, the only instance specified by the plaintiffs (TR 12) has been adequately explained and refuted by the Appellant, Cash Cole. (TR 31-32)

VII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NOS. 19 AND 20 IN THAT THE STATEMENTS CONTAINED THEREIN, THAT THE MORTENSEN GROUP HAVE FULLY PERFORMED AND THAT CASH COLE AND NOWELL HAVE DEFAULTED UNDER THE TERMS OF THE STIPULATION AND SETTLEMENT ARE MISLEADING AND NOT ACCORDING TO THE EVIDENCE. (Point 7(l), 7(m))

The Mortensen group did not turn over their stock in Fairview Development, Inc. to Cash Cole, as provided for in the stipulation; (TR 38) thus preventing said Cash Cole from placing this stock in escrow together with the Fairview stock owned by Bayview Realty, Inc. This stock, as has been pointed out above, was being held in escrow by Roy Sumpter and its release had been prevented by the attorneys for plaintiffs.

As for the obligations to A. G. Rushlight & Co., Pilip & Butt and C. H. Keaton, these were obligations of the Mortensen group and of no concern to Cash Cole. This has been dealt with in paragraph "V" herein.

The Appellants further contend that the Court erred in its statement in its Findings of Fact No. 20 to the effect that "Bayview Realty, Inc., Cash Cole and Nowell have defaulted under the stipulation and settlement agreement" as Nowell did not join in the motion to set aside the final decree and if there has been any default on his part it has been on the side of the plaintiffs. Nowell, as clearly appears from the evidence, was well paid by the plaintiffs for his part in the conspiracy.

The reason for Cole's default with respect to his failure to place the Fairview stock in escrow has been fully explained under paragraph IV herein.

Concerning the failure of Cash Cole to meet the obligations involving the payment of \$89,000.00 as provided for in the stipulation, it is misleading to include this "default" in the Statement of Fact upon which the denial of the motion to set aside the final judgment is based. Appellants, in their motion to set aside the final judgment, and in their various affidavits in support thereof, have clearly stated the impossibility of performance on the part of the Appellants of this stipulation and agreement and the very motion concerns itself with this impossibility and with the fact that the stipulation was obtained by the plaintiffs by fraud, that Cash Cole had been badly overreached and that the plaintiffs had taken advantage of Cash Cole's condition to obtain his signature when he could not read and did not know what he was doing due to his severe illness; all of which is amply supported by the evidence.

Under these circumstances the Appellants had no duty whatsoever to perform under the fraudulently obtained stipulation and agreement.

VIII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 21 IN THAT THE REFERENCES CONTAINED IN THE AFFIDAVITS OF THE APPELLANTS, CONCERNING THE FINANCIAL CONDITION OF FAIRVIEW MANOR AND THE PLAINTIFFS' KNOWLEDGE THEREOF, AND CONCERNING THE SEPARATE NEGOTIATIONS AND AGREEMENTS, WERE MATTERS INTIMATELY CONNECTED WITH THE STIPULATION AND AGREEMENT AND UPON WHICH SAID STIPULATION DEPENDED IN PART. (Point 7(m))

Contrary to the opinion expressed by the Honorable Judge, the Appellants contend that knowledge by the plaintiffs concerning the financial condition of Fairview Manor is directly relevant to the issues raised by the motions.

The stipulation provides as follows:

“ . . . and in consideration of such release and discharge of all liability, *Fairview Development, Inc.*, agrees to pay to Nelse Mortensen, Cliff Mortensen and Frank Henderson, the sum of Eighty-nine Thousand Dollars (\$89,000.00) without interest, as herein provided. . . .” (TR 38)

In view of the above it is hard to understand how the Honorable Judge can arrive at the conclusion that the financial condition of Fairview Manor, the sole asset of Fairview Development, Inc., is irrelevant to the issues.

The Appellants contend, and it is part of their contentions on which the motion to set aside the stipulation and the judgment based thereon is based, that the plaintiffs not only knew, at the time of the execution of the stipulation, that Cash Cole was in-

capable of doing business and did not know what he was doing, but also that the plaintiffs well knew that the stipulation was impossible of performance.

True, the stipulation provided that Cash Cole secure the payment by Fairview Development, Inc., but the plaintiffs knew that the sole income of Cash Cole was derived from Fairview Manor and Fairview Development, Inc. and hence the question of the plaintiffs' knowledge in connection therewith was not only relevant to, but is actually one of, the issues involved.

Appellant, Cash Cole, states that the plaintiffs well knew that the payments by Fairview Development, Inc. provided for in the stipulation, were impossible to meet and that all the plaintiffs had access to the books of the corporation and knew the income from rentals and the payments required by the mortgage and the ordinary expenses. (TR 59) Statements to the same effect may be found in affidavits by Tom Cole, (TR 63) who further states that he advised Dick Rushlight to that effect. (TR 134)

The Appellants further contend that the matters concerning the separate agreement with Nowell and the note to Rushlight are matters relevant to the issues raised and very much to the point.

The said agreement and note were procured at the same time and under the same conditions and circumstances as those under which the stipulation was procured, and these matters were, from the beginning inextricably a part of the general scheme to defraud Cash Cole, as the evidence amply shows and has been

pointed out above. Without the help of Dick Rushlight and of Everett Nowell, who was originally himself a defendant, but apparently who joined with the plaintiffs and came out with a fine settlement, this scheme could not have been carried to its successful conclusion.

Rushlight had been paid all but \$50,000.00 of his contract prior, yet he arranged the settlement under which he got \$125,000.00 from the Mortensen group and a note for \$25,000.00 from Fairview Manor, which amounts to \$100,000.00 more than his original contract. (TR 157)

Refusal by the Honorable Judge to consider these matters as part of the Appellants' proof of the fraud perpetrated upon them was arbitrary and prejudicial error.

IX.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 22 IN THAT THERE WAS NO EVIDENCE THAT CAUSE NO. 3532 WAS DISMISSED AND THAT NELSE MORTENSEN ALASKA CO. IS NOT A PARTY TO THIS SUIT AND ANY DISMISSAL IN THAT CAUSE WOULD NOT PREJUDICE THE DEFENDANTS IN THIS CAUSE. (Point 7(o))

The Court states that this suit is based on "excessive and unreasonable claims". (TR 246) These claims have been fully explained in the Appellants' various affidavits and have been set out in detail in the cross complaint, and never denied and should have been accepted as the truth. (TR 103-131)

The Court further states:

“It was based on excessive and unreasonable claims involving purported defects in construction *which actually resulted from defective plans and specifications prepared by an architect selected by Cole, and from changes connected with the progress of construction, which were required and authorized by the plaintiff corporation.*” (TR 246) (Emphasis added)

Of this opinion there is no proof as the question has not been litigated. Against the bare allegations to this effect stands however, the detailed documentation contained in the cross complaint (TR 103-131) and this whole matter has further been brought out and explained in the various affidavits by and in behalf of the Appellants.

X.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 23 IN THAT THE FINDING IS CONTRARY TO THE EVIDENCE. (Point 7(p))

In its Findings of Fact No. 23 the Court states as follows:

“The purpose of this suit filed by the plaintiffs was to resolve the deadlock in the conduct and affairs of the plaintiff corporation, due to the failure of the board of directors to proceed, to resolve the deadlock among the stockholders and members of said board *resulting of paralysis of corporate functions, to end the dissension and discord in said board, to eliminate mismanagement and improper disposition of funds and dis-*

sipation of assets and impairment of corporate property by the principal defendants.” (TR 247)
(Emphasis added)

The Honorable Judge here adopts as facts the mere allegations by the plaintiffs; allegations which have not been litigated and for which there appears no satisfactory evidence while the Appellants have provided ample evidence to the effect that the management has been, in all respects, efficient and that all the shortcomings and difficulties encountered were solely due to the failure of the plaintiffs to properly perform.

“The proceedings at the trial and the deposition taken theretofore of Cash Cole, and the affidavits filed herein showed many improper acts in management by Cash Cole and members of his family and Nowell: . . .”

The Appellants contend that the testimony given by Cash Cole during the trial was not competent evidence and it was reversible error for the Honorable Judge to consider this testimony in denying the Appellants' motion to vacate the judgment. Cash Cole was called as an adverse witness by the plaintiffs and testified on direct examination. No opportunity for cross examination was afforded the defendants as Cash Cole on the night of the first day of trial suffered a severe heart attack and was unable to attend further. The plaintiffs could not be expected to bring out any of the good of Cash Cole and his side of the story was never touched upon at the hearing.

Evidence from a former trial is never admissible in a subsequent trial if there has been no opportunity for cross-examination.

American Jurisprudence, Evidence, paragraph 695;

Corpus Juris Secundum, Evidence, paragraph 390.

There was no subsequent trial here, but the same rule would prevail, as here Cash Cole's testimony would, of necessity, be completely misleading because no opportunity was afforded him to be cross examined as to these matters.

The "improper acts" enumerated by the Honorable Judge are mere allegations by the plaintiffs which have been arbitrarily adopted as facts contrary to the competent evidence.

The purchase of auto parts for Tom Cole has been explained by Cash Cole as an accommodation extended to the employees of Fairview Manor in order to take advantage of wholesale rates for which Fairview Manor has been paid back. (TR 149) It should further be noted that Tom Cole's truck was sometimes used for hauling for the project.

The Appellants further state that Cash Cole's daughter-in-law received a message that her mother in Kansas was dying an hour or two before the departure of the night plane. The charge for the fare was made to Fairview Manor and later paid for by Tom Cole, her husband, Assistant Manager of Fairview. The record shows that this was paid as per the signature of the receiver.

The telephone calls of which the plaintiffs complain were in the regular line of business at the time when \$140,000.00 worth of improvements were being made and during the continuous conferences with lawyers trying to defend the property rights against the Mortensen group and their numerous wrong doings.

The bar referred to is a simple counter with built-in stools, to use in place of a table and chairs for eating. In Mr. Nowell's absence this apartment was rented at \$14.00 per night when in use as an emergency apartment. (TR 28)

The payment to Nowell of \$1,000.00 per month could not rightly be considered an improper act in view of the contract between Bayview Realty, Inc., and Fairview Development, Inc., providing for a fee to be paid to Bayview for the management of Fairview Manor of five percent of the total income of Fairview Development, Inc., with a minimum guarantee of \$2,000.00 per month. (TR 25) It should be noted with respect to this, that Nowell's salary was voluntarily discontinued on January 1, 1951, after which time Bayview received considerably less than the amount contracted for. (TR 24-25)

As to these and other "improper" acts, none of these are more than mere allegations as to which the Appellants have had no opportunity to present any kind of defense because said Appellants, by the Court's denial of the motion to vacate the judgment, have been deprived of their opportunity for trial.

XI.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN APPOINTING A RECEIVER FOR FAIRVIEW MANOR. (Point 2)

Concerning the appointment of receivers the following is quoted from American Jurisprudence, V. 45, Receivers:

“51. *Dissatisfaction, Dissension, Disagreement.* The general rule is that *dissatisfaction of stockholders and dissension and disagreement among stockholders and directors are not in themselves grounds for the appointment of a receiver of corporate property.* Mere differences or disputes as to corporate management, so long as the officers or stockholders do no act that is fraudulent, illegal or ultra vires, will not warrant the intervention of a court of chancery, because in the absence of fraud, illegality or conduct that is ultra vires the will of the majority is entitled to control. . . . *Dissensions between two persons who are equal owners of the stock of a corporation, and are also its officers, will not justify the appointment of a receiver so long as no actual wrong is committed by either of them . . .* However, the courts have been comparatively liberal in the appointment of a receiver of a corporation, even though it is a solvent and going concern, where there are such dissensions among the stockholders, directors or officers that the corporation cannot successfully carry on its corporate functions, imminent danger of loss of assets is threatened and no other remedy appears to be adequate.” (Emphasis added)

The plaintiffs, in their complaint, allege various “wrong-doings” on the part of the defendants in sup-

port of their contention that a receiver should be appointed for Fairview Manor from which the Appellants quote.

“VII. That as the apartment units were completed . . . the defendants, Cash Cole and Everett Nowell, acting individually or as officers, directors and stockholders of Bayview Realty, Inc., or both, . . . did wrongfully usurp and take unto themselves, without any authority, possession of the premises and the control of said apartment housing project, collecting the rentals therefrom, controlling the project and disbursing the rentals at will and without accounting to the plaintiffs . . . all without any right or authority whatsoever.” (TR 6)

“IX. . . Cash Cole and Everett Nowell . . . have without right or authority paid themselves from the rentals and funds belonging to the plaintiff Fairview Development, Inc., salaries and expenses never approved or authorized by the plaintiff Fairview Development, Inc., or the board of directors of said Fairview Development, Inc. . . . Said salaries and withdrawals have been exorbitant, beyond all proportion to services rendered and without lawful authority or legal right. . . . In addition thereto said defendants, Cash Cole and Everett Nowell, have occupied apartments in said project rent free likewise without any authority or approval . . . Cash Cole and Everett Nowell have further and without any legal right or legal authority paid to themselves . . . large expenses and costs of living for themselves and their families while sojourning beyond the limits of the City of Fairbanks and not in the furtherance of any interest or business of the

plaintiff Fairview Development, Inc., or said Fairview Manor project . . . Said defendants have failed to account for the funds belonging to the plaintiff corporation . . . or to obtain the approval of said board of directors . . .” (TR 6-7)

These and other allegations by the plaintiffs have been fully answered and explained by the defendants. The management of Fairview Manor had been entrusted to Bayview Realty, Inc., pursuant to resolution of the Board of Directors of Fairview Development, Inc., of August 3, 1951, (TR 24-25) and by contract between Fairview Development, Inc., and Bayview Realty, Inc., pursuant to said resolution, executed on December 1, 1951.

Plaintiff, Fairview Development, Inc., retained a firm of certified public accountants and one of the members of said firm set up a system of books when Fairview Manor was first opened for occupancy which system has been followed at all times during the intervening period. (TR 26-27) (TR 162-165)

Under the contract of management (TR 25) Bayview, of which Cole and Nowell were the sole owners, was to receive five percent of the total income of Fairview Development Inc., with a minimum guaranty of \$2,000.00 per month. Cole and Nowell had managed the project up to January 1953 when drastic economies were deemed necessary. Nowell took other work and has not received any salary since. (TR 28) Cole has managed the property since.

The plaintiffs complain that the defendants have received “exorbitant” salaries and that Nowell was

drawing a salary even though he spent his time in other employment. This is completely irrelevant in view of the contract between Fairview and Bayview which provided for a minimum payment of \$2,000.00 per month and in view of the fact that the defendants chose, when they deemed it necessary, to reduce this by \$1,000.00 per month by discontinuing Nowell's salary.

As for the disbursement of funds, this was, of course authorized by the Board and under the contract, a full accounting was available at all times with respect thereto as the accounts were regularly supervised and audited by a firm of certified public accountants, chosen by the plaintiff corporation. (TR 26-27) (TR 164-165)

Concerning these expenditures Appellant Cash Cole states:

“ . . . That the individual plaintiffs herein, namely Nelse Mortensen, Cliff Mortensen and Frank V. Henderson have, as stated above, individually assumed the liabilities and responsibilities of that certain contract for the construction of the project. That the said three individuals refused and neglected to pay during the construction work on said housing project, although required to do so by the contract herein referred to, interest on the mortgage due January 1, 1952, in the amount of \$9,075.26 and thirty days delinquent interest in the amount of \$30.25 and interest on mortgage due February 1, 1952, in the amount of \$9,194.00; they further refused and neglected to pay real estate taxes levied August 1, 1951, in the sum of \$31,612.00 and that due to such neglect and

failure and refusal of those three individuals to make the required payments, these defendants, as officers, directors, and managers of Fairview Development, Inc., were required to make such payments from the assets of Fairview Development, Inc.” (TR 29)

The Appellants further present a detailed description of the violations of the terms and covenants of the contract of construction and of the shortcomings in said construction which necessitated large expenditures in order to render the project fit for occupancy. (TR 103-131) As to the efficiency of management and the necessity of these large expenditures the Appellants refer to the following quotation from a letter from J. F. Campbell, Vice President and Manager of the Mortgage Loan Department of the Seattle Trust and Savings Bank:

“First, I want to compliment you on the work that has been done to keep the property operating in an efficient manner. Upon receipt of the figures indicating the amounts of money that have been spent, they appear staggering at first glance but after my examination of the premises and familiarizing myself with the problems which you have had to face, one cannot help but admire the management’s approach to its problems and its will and determination to correct the deficiencies that have developed, for the preservation and continued operation of the project.”

These and many other statements by or in behalf of the Appellants, too numerous to quote in detail,

present a clear and unequivocal answer to the vague and unsubstantiated allegations and accusations by the plaintiffs. The fact is that the management of Fairview Manor faced almost insurmountable obstacles due to the failure on the part of the plaintiffs to meet the payments which under the contract it was their duty to meet, and due to the dereliction of duty of said plaintiffs in the construction of the project which the Honorable Judge, in spite of the detailed documentation, calls them "excessive and unreasonable claims". (TR 246)

The Appellants quote further from American Jurisprudence, V. 45, Receivers:

"52. *Deadlocks*. A deadlock between directors or stockholders in a disagreement as to the affairs of a corporation, does not in itself suffice as ground for a receivership. At least where there is no imminent danger of loss of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree, the court will not upon affidavits and in advance of a trial on the merits, by placing the property in the hands of a receiver, wrest the possession of the corporate property from the corporation, and from those officers who are duly elected and who prima facie are entitled to administer the affairs of the corporation. However, dissensions among the stockholders or officers of a corporation as the result of which a deadlock is created and it is unable to successfully carry on the corporate business, have in some cases been regarded as sufficient grounds for the appointment of a receiver."

The main complaint touching upon dissension and disagreement seems to be contained in the plaintiff's statement to the effect that Cash and Nowell, at a meeting on October 29, 1952, allegedly refused to submit certain disputed matters to Kenneth Kadow as provided for by the agreement between the parties. (TR 12-13) For this, Appellant, Cash Cole, offers a perfectly reasonable and adequate explanation which, if given proper weight, clearly shows unreasonable conduct on the part of plaintiff, Cliff Mortensen. Cash Cole states, among other things, as follows:

“Everett Nowell as president of the corporation sent out notice to the directors of the corporation that a special meeting for the specific purpose of discussing the feasibility of construction of an additional light plant, as the corporation was confronted with problems coming up that winter with reference to the light and electricity. Cliff Mortensen voted ‘No’ upon the proposed proposition; Cash Cole and Everett Nowell voted ‘Yes’. After the matter was discussed, which was the only matter to be discussed in the special meeting, the said meeting was adjourned. Minutes were taken and duly written up and signed by the President and Secretary-Treasurer of the corporation and are part of the records of the corporation. The only reference to Ken Kadow or Roy Sumpter during the meeting was the fact that Cliff Mortensen suggested that the matter should be referred to one of these gentlemen. Cash Cole and Everett Nowell suggested that the matter should be referred to an electrical expert familiar with the conditions at the project. No action was taken. *After the meeting was ad-*

*journe*d further discussion was had during which Cliff Mortensen's attorney, Diamond, who was with him made an accusation concerning Cash Cole of 'milking' the company, whereupon Cash Cole walked out." (TR 31-32) (Emphasis added)

In the present case there was no imminent danger of loss of corporate property or of irreparable damage shown in any manner which would convince the impartial observer, while the Appellants have met these allegations, for which there is no support other than the statements by the plaintiffs themselves, with detailed denials and documentations.

As the following cases clearly hold, the courts will not authorize the appointment of a receiver unless there is imminent danger of loss of corporate property or irreparable damage to the corporation and its stockholders, or where the dissension and deadlock within the board is so serious as to prevent the corporate functions. None of this has been shown by the plaintiffs in any satisfactory manner.

Carey v. Dalgarn Constr. Co. (1930), 171 La. 246, 130 So. 344.

" . . . payment of excessive salaries or commissions, or other grounds for appointment of a receiver, were not shown so as to warrant the appointment. The Court observed that, if the majority stockholders were guilty of paying themselves salaries out of proportion to the services rendered, and had paid themselves illegal commissions *the plaintiff's remedy was a suit to bring such funds back into the treasury of the*

corporation and to prevent future excessive payments by injunction; . . ." (Emphasis added)

And in *Horejs v. American Plumbing & Steam Supply Co.* (1931), 161 Wash. 586, 297 P. 759:

"Illegality of salaries voted to corporation officers held not ground for receivership; stockholders having adequate remedy by action to restrain or recover payments."

The following cases conclusively bear out the contention that there must be clear and convincing evidence pointing to the necessity thereof before an appointment of a receiver may be authorized.

Skirvin et al. v. Coyle et al. Oklahoma, 1939, 94 P 2d 234:

Syllabus of the Court: 1. A minority stockholder has the right to inspect and examine the books and records of his corporation at all reasonable times and such rights should be fully enforced by the courts, *without a general receivership of the corporation.* 2. The exercise of the power to appoint a receiver *should be exercised with extreme caution, and only under circumstances requiring summary relief, or where the court is satisfied that there is imminent danger of loss.*" (Emphasis added)

Peiser et al. v. Grand Isle, Inc. La. 1952, 60 So. 2d 1:

"Courts are slow to interfere with management of the affairs of a corporation in absence of a clear showing of fraud or breach of trust."

The rule that the appointment of a receiver is discretionary and that the power should be exercised only in cases where there is fraud, spoliation or imminent danger of loss of property was applied in *Horejs v. American Plumbing & Steam Supply Co.*, 297 P 759, and in *Kahan v. Alaska Junk Co.* (1920), 111 Wash. 9, 189 P 262, it was held that a minority stockholder of a corporation is not entitled to a receiver because of illegal practices in the conduct of its business until he has exhausted all other remedies, if little prospect of loss of his property rights appears.

Ward v. National Ice Cream Co. et al. (Mo. 1922), 246 SW 554:

"A receiver will not be appointed for a corporation in doubtful cases, and fraud or conduct amounting to fraud must clearly appear, and the minority of the stockholders must show it is otherwise remediless." (Emphasis added)

Litz v. S. L. Knitting Co., 80 N.Y. 2d 535:

"A party is not entitled to appointment of temporary receiver unless his right to such relief is plain from undisputed facts, and if right depends on an issue which can be decided only at trial, relief cannot be granted." (Emphasis added)

Accord:

Rabinowitz v. Steinberg, 112 NYS 2d 758.

In the case at hand the plaintiffs have presented only allegations in their complaint and by affidavits as to alleged misconduct and disbursement of assets

without authority on the part of the defendants and with respect to alleged dissensions and deadlock within the corporation and its Board of Directors. These allegations have been clearly and emphatically denied or satisfactorily explained by the Appellants and the Court in its Findings of Fact and Conclusions of Law based thereon has chosen arbitrarily to disregard the Appellants' contentions and their clearly documented evidence to the contrary.

According to the weight of authority mere affidavits on the part of the plaintiffs will not suffice. There must be imposing and persuasive proof:

Gillies v. Pappas Bros. & Gillies Co. (New Jersey, 1946), 47 A 2d 424:

"Chancery Court ordinarily will not appoint a receiver for a solvent corporation upon affidavits the truth of which are (sic) denied in counter affidavits."

Neff v. Progress Bldg. Materials Co. (New Jersey, 1947), 51 A 2d 443:

1. Syllabus of the Court. The appointment of receivers, whether to accomplish a dissolution and liquidation under the authority of the Corporation Act . . . or to serve in a custodial capacity in pursuance of the inherent equitable jurisdiction of this court, *is an important adjudication which is rendered only with supreme caution and upon imposing and persuasive supporting proof.*
2. The appointment of a receiver is not a remedial measure to which an aggrieved litigant is entitled as a strict legal right.

3. The induction of a receiver emanated in a proper case from the exercise of sound legal discretion.

4. The practice of filing a bill assailing the financial stability, credit and prospective responsibility of a corporation without coincidentally submitting the merits of the allegation to the consideration of the Court is disapproved.

5. *The appointment of a custodial receiver is essentially a preliminary injunctive expedient and should not be granted unless such intermediate relief is exigent.* (Emphasis added)

Riddle et al. v. Mary A. Riddle Co. et al. (New Jersey, 1947), 54 A 2d 607:

“On application for custodial receiver of a solvent corporation and a preliminary restraint against its officers and directors on ground of fraudulent violation of trust relationship, *there must appear imposing and persuasive proof, free from doubt, that applicants are entitled to relief requested, and that irreparable injury is impending.*” (Emphasis added)

The Appellants submit that in the case at hand all of the allegations by the plaintiffs were denied and explained in an unequivocal manner in their answer, cross complaint and in their several affidavits as well as in affidavits in their support; that the Court below did not act with “supreme caution” and that the plaintiffs here did not possess any “imposing and persuasive proof”—did, in fact, not present any proof whatsoever; and the Appellants further submit that there was, in the case at hand, no danger whatsoever

of "impending irreparable injury", as Cash Cole was financially responsible and well able to meet any liabilities contingent upon a trial on the merits.

The cases authorizing the appointment of a receiver all show imminent danger to the property of the corporation and clearly disclosed facts producing a conviction on the part of the court that denial of the appointment of a receiver would result in the destruction of the corporation. No such facts are shown in the present case, nor did there, in the case at hand, exist any danger to the existence of the corporation.

Wood v. York R. Co., 3 F.S. 665:

"Where a stockholder of a railway company brought suit for appointment of a receiver, the court, in overruling a motion to dismiss the bill, and directing the defendant to answer, stated that a receiver might properly be appointed, or other relief afforded the plaintiff, *if, on final hearing, the facts clearly disclosed such mismanagement of the defendant's business and affairs by its board of directors as to produce a conviction that further control of the corporation by the board would result in the destruction of the business and insolvency, or cause great or unnecessary loss to its creditors or stockholders.*" (Emphasis added)

XII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS FINDINGS OF FACT NO. 13. (Point 7(h))

In its Findings of Fact No. 13 the Court states:

“ . . . the principal defendants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions as follows:”

Whereupon the Court enumerates some of these so called “few scattered conclusions of fact”:

“That plaintiffs ‘acting in concert with one W. A. Rushlight’ induced him to sign the stipulation, when he did not know the contents thereof: That Cash Cole relied on a false and fraudulent statement as to the contents of said stipulation made by ‘A. G. Rushlight Co.’ ”

The Appellants contend that the part played in the conspiracy by W. A. Rushlight has been clearly shown by said Appellants. The circumstances under which W. A. Rushlight obtained the signature of Cash Cole on the stipulation, the note to Rushlight and the agreement with Nowell have been dealt with in Appellants’ contentions Nos. I, II, and III and elsewhere, *supra*.

The motion to set aside the judgment and the several affidavits by or in behalf of the Appellants all show how Cash Cole was duped into signing these documents while he was under the care of a physician, suffering from a severe heart attack and unable to read or to comprehend.

It is noteworthy that the plaintiffs have not attempted to offer any medical testimony of their own

to the contrary. The Honorable Judge states in his Findings of Fact No. 12:

“Dr. Joseph M. Ribar attended Cash Cole following his purported heart attack at the end of the first day of the trial. The doctor merely stated that at no time within one week after said attack was Cash Cole in a proper physical or mental condition to transact business matters and admitted that he was unable to state as to whether Cash Cole was mentally competent to transact any business matters after the expiration of 72 hours following his attack, that is, after October 7, 1954 (sic), since the patient was not examined to determine his mental competency. . . .” (TR 238)

The Honorable Judge seems to rely on the apparent discrepancy in this statement; but be it as it may, it has been conclusively shown that Cash Cole was a very sick man and in the first affidavit by Dr. Ribar the following statement is of importance and should, regardless of other considerations, settle the question as to Cash Cole's condition:

“... that affiant made several calls on Cash Cole during the *following week and found that the patient was slowly recovering his strength and that he was regaining his vision*, although he was still a very sick man. . . .” (TR 65) (Emphasis added)

That, the Appellants submit, was one week after the heart attack and several days after the execution of the stipulation and accompanying documents.

The Honorable Judge further states, in Findings of Fact No. 12, that the affidavits submitted in behalf of the defendants contain conflicting statements as to Cash Cole's comprehension and capacity. These statements, with the exception of that of Dr. Ribar, were given by laymen and their opinion as to the length of time during which Cash Cole was unable to read or to comprehend would naturally vary somewhat. These statements, however, are all in accord in their conviction that Cash Cole was unable to read or to comprehend during the crucial period of the negotiations and until after he had executed the documents. Consequently any discrepancy in this respect is of no importance whatsoever and does not, in any way weaken the testimony.

The Honorable Judge further states, in Findings of Fact No. 13 that the demand note to Rushlight and the agreement with Nowell had no place in the stipulation. (TR 240) True, these documents were not directly a part of the stipulation, but they were so intimately connected therewith that it is reversible error to disregard them. It is claimed by the Appellants, and ample proof thereof has been submitted, that the stipulation was obtained by fraud and conspiracy and that the obtaining of the note by Rushlight and of the agreement by Nowell were the means by which these former friends of Cole whom he trusted, were induced to act to his detriment. These matters have been dealt with in Appellants' contention No. III.

The Honorable Judge even goes so far in his effort to discredit the Appellants that he stresses what is obviously a mere typographical error as a "discrepancy", to wit, the substitution of "A. G. Rushlight Co." for W. A. Rushlight (TR 240) which appears in Cole's affidavit. (TR 57)

As to the reason for the scheme, as claimed by Cash Cole:

"... to secure not only the profits from contracts of construction, but also over \$1,000,000.00 by failing to do the work, etc.;" (TR 240)

The statements pertaining thereto have been amply documented in the cross complaint (TR 103-131) and in the Appellants' affidavits.

Concerning the plaintiffs' statements on the other hand, the Honorable Judge states as follows:

"... The other parties to the negotiations deny any such conspiracy, fraud or other charges and in their affidavits set up the ultimate facts leading up to the settlement and said stipulation as hereinabove indicated." (TR 240)

The Appellants contend that all the plaintiffs have set up are mere denials and allegations without any proof whatsoever.

The Honorable Judge further seems to place great importance on statements by the plaintiffs to the effect that said plaintiffs were willing to buy the interests of the principal defendants and settle all claims

on the same terms and conditions as those contained in the final settlement agreement contained in the stipulation. (TR 240-241)

The statement to this effect by the plaintiffs should be given no weight whatsoever. Obviously, the deal could, by the very nature of things, not have been reversed "on the same terms" and further, there appear no documents, no written memorandum as to these purported terms and we have nothing on which to rely as to the truth of this statement but the plaintiffs' bland statement itself.

In this respect it should be noted that instead of the yearly payments offered to Cash Cole should he decide to buy from the Mortensen group, the stipulation provided that Cash Cole would be in default within three (3) months time and that the Mortensen group could then take over immediately.

XIII.

THE APPELLANTS CONTEND THAT THE COURT ERRED IN ITS CONCLUSIONS OF LAW. (Point 7(g))

The Honorable Judge states, in his Conclusions of Law, No. 1—the defendants have failed to sustain any grounds under Rule 60 (b) of the Federal Rules of Civil Procedure on which the court can set aside or rescind the stipulation or vacate the final judgment based thereon. (TR 248)

This has been discussed in Appellants' contention No. I, *supra*. The following cases further support the Appellants' contention that the Court erred in so ruling:

Assman v. Fleming, 159 F 2d 332:

"... The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles."

Washington v. Sterling, 90 A 2d 836.

Hall v. McConey, 132 SW 618:

"The trial court's discretion in passing on a motion to set aside a default judgment is not arbitrary or capricious, *but is judicial and must be exercised upon definite facts from which legal inferences result.*" (Emphasis added)

The conclusion that there is no "clear, unambiguous and convincing proof" of fraud or conspiracy or "any of the other acts charged in the motion" is reversible error in view of the analysis presented by the Appellants in the preceding paragraphs. (TR 248-250)

The conclusion that the Mortensen group has completed performance of the terms and conditions set forth in the stipulation and that it would therefore, be inequitable to rescind the stipulation and set aside the judgment is also reversible error in view of the evidence as set forth above, and in view of the fact that there was still no adequate consideration as the Mortensen group had done nothing which they were

not already obligated to do and for which they were not already liable.

The conclusion that Cash Cole has ratified and affirmed the settlement by failing to disaffirm without delay (TR 250) is error because the evidence shows that, even if Cash Cole were able to read within a short time after he had been induced to execute the stipulation and other documents, he was still a very sick man for a very long time thereafter.

Further, the Appellants have one year under Rule 60 (b) within which to file the motion.

Concerning the cross-complaint filed by the defendants, (TR 250) the dismissal of Cause No. 3532 would not prejudice the defendants in the present cause as Nelse Mortensen Alaska Co. is not a party to this action; and further that the plaintiffs instituted the present action and the Appellants are entitled, under Rule 60 (b), Federal Rules of Civil Procedure, under the circumstances as analyzed above, to have this controversy tried on the merits and to file a cross-complaint.

The Honorable Judge, finally, as a result of these erroneous findings and conclusions, arrives at the conclusion (TR 251) that Cash Cole, as a consequence of having defaulted on a contract the performance of which was well known by all parties to be impossible, must turn over all of his interest in Fairview Development, Inc. and Fairview Manor to the Mortensen group. It is strangely ironic that the Honor-

able Judge here states that Roy Sumpter of Seattle, Washington, should be directed "to endorse and/or deliver to said individual plaintiffs the certificate or certificates of stock of Fairview Development, Inc."; thus recognizing the impossibility on the part of Cole to deliver this stock in escrow as per the stipulation, inasmuch as he did not have possession and was kept from possession of this stock by the attorneys for the plaintiffs, (TR 135-136) while the Honorable Judge, at the same time states in his Findings of Fact No. 20 (TR 245) that Cole and Nowell have defaulted under the stipulation in this respect.

The clause, contained in the stipulation and agreement, that the Mortensen group might, upon default, immediately declare the full balance due and require the escrow holder to deliver the stock to them as their property (TR 39) cannot be deemed liquidated damages but must be considered a penalty; particularly in view of the fact that performance under the stipulation was impossible and that this impossibility of performance was well known to all parties concerned and must now be recognized by any unbiased observer.

Concerning penalties as opposed to liquidated damages the Appellants quote from McCormick on the Law of Damages (1935) Chapter 24, page 599:

Liquidated Damages and Penalties defined and distinguished:

"Paragraph 146 . . . If it is determined that the amount was fixed in good faith as an estimate by the parties of the probable injury to be suf-

ferred from a breach, then it will be denominated 'liquidated damages' and the agreement will be enforced; but if the court finds that it was not such a pre-estimate, *but was fixed merely as a deterrent to prevent a breach, it will be termed a penalty and the agreement will not be enforced.*" (Emphasis added)

It is thus manifest that the Court erred twofold with respect to his Findings of Fact and Conclusion of Law No. IX. First, in his denial of the defendants' motion to set aside the judgment under Rule 60 (b) Federal Rules of Civil Procedure on the ground of fraud which has been amply proved by the evidence; and second, because this clause of forfeiture must, in view of the established facts as analyzed herein, be considered a penalty and not liquidated damages.

CONCLUSION.

In conclusion we must say that there are no authorities that we have ever known that will justify a vengeance being heaped upon a good citizen as has been done in this case against Cash Cole. Without a trial he has been deprived of his livelihood, and in many instances without the slightest degree of evidence has suffered a Finding against him. He has been dispossessed and moved out of his property when the cross complaint shows that the plaintiffs in the case below are indebted to him and to his com-

pany in many thousands of dollars. It appears to us to be an effort to prevent a thorough and complete trial, as well as to deprive Cash Cole of the job of managing the apartments that he was so successfully doing, and to place a receiver in the property over and against the interests of the one and only person who is entitled to the possession thereof. The evidence of the defendants based upon the affidavits filed herein, most of which were never even denied, shows conclusively a very effective management on the part of Cash Cole. There is not a scintilla of evidence of any dishonesty on his part or any arbitrary abuse of the plaintiffs in this action. It was never intended by the law or equity that plaintiffs could come into court and in such a high-handed method without a trial defeat justice as has been done here. The plaintiffs are in possession of the property now by reason of various orders made by the trial judge in the case below and will surely slip by and defeat their many just debts if this proceedings should be upheld.

Without the plaintiffs using a word of competent testimony on their behalf, they have taken this property away from Cash Cole, have broken their contract of management thereof, have browbeaten him by forcing him by an order of the court to move out of the premises, have taken his corporate stock without a trial; and sincerely we can think of no case anywhere, where such a high-handed method has gone unnoticed and has not been corrected by an Appellate Court when the same is properly put before it. We still have faith in the constitution and laws of the

United States and with confidence we trust that this Honorable Court will correct this tragedy, and humbly submit this, our Brief.

Dated March 4, 1955.

Respectfully submitted,

WARREN A. TAYLOR,

WILLIAM H. SANDERS,

BAILEY E. BELL,

By BAILEY E. BELL,

Attorneys for Appellants.

No. 14,424

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

**On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.**

BRIEF FOR APPELLEES.

LYCETTE, DIAMOND & SYLVESTER,

Hoge Building, Seattle 4, Washington,

COLLINS AND CLASBY,

JOSEF DIAMOND,

WALTER SCZUDLO,

Box 1368, Fairbanks, Alaska,

Attorneys for Appellees.

FILED

JUN -2 1955

PAUL P. O'BRIEN, CLERK

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No. 14,424

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

**On Appeal from the District Court of the United States
for the Territory of Alaska, Third Division.**

BRIEF FOR APPELLEES.

Appellants' "Statement of Case" is deficient in the following, among other things: (a) It fails to comply with rule 24 in failing to present succinctly the question involved in this appeal, and to list and specify assigned errors on which appellants intend to rely. (b) It is incomplete as to proceedings and facts resulting in the question before this court on appeal. (c) It fails to show the controverted facts. (d) It fails to cite frequently reference to the transcript. (e) It fails to distinguish clearly between matters arising prior to the final decree and order entered October 10, 1953, matters arising subsequent thereto,

and matters arising on and after May 7, 1954 when appellants' motion to vacate judgment was denied. Rather than pointing out specifically these deficiencies, and attempting to remedy them piecemeal, a more complete statement of the case will be made for the convenience of the court, and to avoid the necessity of constant reference between the briefs of the parties.

STATEMENT AS TO PLEADINGS AND PROCEEDINGS.

Nature of case.

This was in the nature of a stockholders' suit.

Complaint.

A complaint was filed by the appellee corporation and owners (plaintiffs in the trial court) of 50 percent of its common stock to secure appointment of a receiver and an accounting from the appellants Cash Cole, Everett Nowell and Bayview Realty, Inc., (defendants in the trial court) and, if necessary, to wind up said corporation for the following reasons, among others: Existence of an impasse in the conduct of its corporate affairs due to deadlock and dissension in the Board of Directors and among the stockholders; dissension and discord as to who, in fact, comprise the directorate; improper disposition and misappropriation of corporate funds; dissipation of corporate assets; impairment of corporate property; and usurpation of control and possession of corporate assets, income and profits by the appellants, owners of the other 50 percent of the common stock, and

exercise by them of corporate powers without the authority of the Board of Directors and the stockholders, contrary to the provisions of the corporate charter, by-laws and the General Laws of the Territory of Alaska. (TR 3-15.)

Answer.

The principal appellants, Cash Cole (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.), Everett Nowell (individually and as an officer and director of Bayview Realty, Inc., and Fairview Development, Inc.), and Bayview Realty, Inc., filed an answer in the nature of a general denial. (TR 15-20.)

Application for receiver pendente lite.

A motion for appointment of receiver was filed pendente lite on June 25, 1953. (TR 278-280.) Affidavits in support of said motion and a motion for temporary injunction were filed by appellees. (TR 280-287, 304-313, 314-316, 317-329, 329-359, 360-368.) Affidavits in opposition were filed by appellants. (TR 281-288, 288-289, 290-294, 295-299, 300-304.) Although a hearing was had on these motions prior to trial, a receiver was not appointed pendente lite without prejudice to a renewal of said motion.

Trial and settlement negotiations.

The trial commenced on October 5, 1953, and continued during that day, including the taking of the testimony of Cash Cole on direct examination as an adverse witness for the appellees. (TR 424-535.) That evening he purportedly suffered a heart attack

(TR 536), and the trial was continued from day to day until the entry of the final judgment, except for the taking of the testimony of Arnoldine Scott. (TR 549-569.) Negotiations at the suggestion of Cash Cole's attorneys (TR 71) were immediately undertaken for the purpose of settling the various claims of the parties involved in this case, other pending litigation between them (see *infra*, par. 10), and the case filed by A. G. Rushlight & Co., No. 7163, to foreclose its mechanics' lien against Fairview Manor. (See *infra*, par. 9.)

Receiver.

On October 8, 1953, Robert E. Sheldon was appointed as receiver in this cause for the Fairview Manor and all the assets of the corporate appellee, in view of the lack of any settlement on that date, the probable indefinite continuance of the trial, and the purported illness of Cash Cole. (TR 542-547; order, 368-370.)

Compromise and final decree and order.

A written stipulation settling all claims of the parties in this case was executed by them October 9, 1953, providing, among other things: (a) For sale of the common stock owned by the Mortensens and Henderson to Cash Cole; (b) release of all claims against Cash Cole, and Fairview Development, Inc., by the Mortensens and Henderson in consideration of the payment of \$89,000.00 by Fairview Development, Inc., payable \$6,800.00 at the time of execution, \$3,200.00 on December 31, 1953, and thereafter \$5,000.00 quarter

annually; (c) security for performance by said Fairview Development, Inc., of said agreement to pay by deposit in escrow of all common stock then owned or acquired through the settlement by Cash Cole, Everett Nowell, and Bayview Realty Company, such stock in the event of default to become the property of Mortensens and Henderson in satisfaction of said sum of \$89,000.00; (d) payment by Mortensens and Henderson to Nowell of a claim of \$6,800.00, and dismissal of litigation involving said claim; (e) assumption by Mortensens and Henderson of responsibility for claims of mechanic's liens by A. G. Rushlight and Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton involved in above mentioned case No. 7163; (f) release to Mortensens and Henderson of approximately \$8,800.00 held on deposit at the National Bank of Commerce in Seattle; (g) dismissal of all pending litigation with prejudice; (h) resignation of Mortensens and Henderson as officers and directors; (i) agreement for no change in the corporate articles of the appellee corporation, or incurrence of any unusual debts until payment of said sum of \$89,000.00; (j) approval of the stipulation by court; (k) and execution of such other documents as might be subsequently required to consummate terms of said settlement. (TR 38-44.) At the same time a separate settlement agreement was made with A. G. Rushlight & Co., of its claim in case No. 7163, and filed in the form of a stipulation providing for payment of \$125,000.00 by Mortensens and Henderson to said claimant. (TR 75, 76, 93.) A final judgment approving the settlement filed in this cause was entered

on October 10, 1953, by the trial court and provided for discharge of the receiver and the carrying out of the terms and provisions of the agreement contained in said stipulation. (TR 45-46.)

Withdrawal of attorneys.

Cake, Jaureguy & Hardy, theretofore one of the firms representing appellants, filed notice of withdrawal on December 17, 1953. (TR 371.)

Motion to set aside stipulation and vacate judgment.

On January 8, 1954, the appellants, Cash Cole and Bayview Realty, Inc., by their present counsel, filed a motion to set aside said stipulation and vacate said judgment under Rule 60 (b) of the *Federal Rules of Civil Procedure* upon the following grounds: (a) Fraud; (b) inability "to properly think" or "comprehend" of Cash Cole as a result of heart attack; (c) mistake, inadvertence, surprise, excusable neglect; (d) conspiracy to defraud by the Mortensens, Henderson, Nowell, and W. A. Rushlight; (e) stipulation and decree is unconscionable, impossible of performance and confiscatory; (f) no authority by boards of directors or stockholders to execute stipulation; (g) separate agreements made with Nowell and Rushlight were without consideration; and (h) no ratification of stipulation by Cash Cole. (TR 52-56.) In support of said motion various affidavits were filed by appellant Cash Cole, and by Tom Cole and Mrs. Ruth Cole; and affidavits were filed by appellees generally denying assertions contained in latter. These affidavits are hereafter considered.

Appellees' motions to show cause and for appointment of receiver.

On February 13, 1954, the individual appellees moved for the entry of an order directing the appellants Cash Cole and Bayview Realty, Inc., to show cause why they should not be held in contempt of court for failure to comply with the terms of the final decree entered October 10, 1953, and the settlement agreement evidenced by the stipulation filed October 9, 1953, and for failure to deliver the capital stock of appellee corporation as provided in said decree and stipulation, or in the alternative that an order be entered directing them to assign and deliver the certificates evidencing said stock to the Mortensens and Henderson. (TR 373-374.) An amended motion was likewise filed March 19, 1954 for reinstatement of Robert E. Sheldon as receiver in this case or for appointment of some other disinterested person as receiver to take over the management of Fairview Manor Apartments and the assets of appellee corporation, until said appellants had complied with the terms and provisions of said final decree and stipulation. (TR 183-187.) Affidavits in opposition to appellants' motion to vacate the final decree and in support of the motions to show cause and for appointment of receiver were filed by appellees Cliff Mortensen and Frank V. Henderson, and by Joe Diamond, Earle Zinn, Everett Nowell, W. A. Rushlight, and Dr. Joseph M. Ribar, and are hereafter considered together with affidavits filed in response thereto.

Notice of default and demand.

Said notice dated February 9, 1954, and filed on February 13, 1954 was served on appellants, showing their defaults under the settlement agreement, and termination of ownership thereby in stock pledged as security. (TR 371-373.)

Order denying motion to vacate.

The court considered appellants' motion to set aside said stipulation and vacate the final decree on the above mentioned affidavits and proceedings had in this case, and oral arguments of counsel for the respective parties. The matter was taken under advisement and thereafter findings of fact and conclusions of law were entered and filed by the court on May 7, 1954 (TR 228-252), and an order entered denying appellants' motion to vacate the final judgment, appointing a receiver, and directing delivery of the certificates of stock theretofore owned by the appellants to the individual appellees. (TR 252-258.)

Notice of appeal.

A notice of appeal was filed by the appellants Cash Cole, individually, and as an officer and director of Bayview Realty, Inc., and Bayview Realty, Inc., from the final judgment, and from the order over-ruling appellants' motion to set aside and vacate said final judgment. (TR 264.) An effort was made to include Fairview Development, Inc. as a party to said notice of appeal, but upon motion of appellees (TR 401-402) the name of said Fairview Development, Inc. was stricken by the trial court from said notice. (TR 266.)

STATEMENT OF CASE.

It is desirable to consider first, the facts and circumstances surrounding the appellants' motion to set aside the compromise agreement of October 9, 1953 and to vacate the final decree and order entered October 10, 1953, which is the only substantial matter involved in the sole issue before this court, hereinafter noted; and secondly, to note briefly the facts in dispute involved in this case leading up to said compromise agreement and final decree and order, which are not actually involved in the question now before this court.

A. CIRCUMSTANCES SURROUNDING THE COMPROMISE AGREEMENT AND SUBSEQUENT EVENTS.

1. Settlement negotiations.

Negotiations to compromise the conflicting claims of the parties involved in this cause, as well as the claim of A. G. Rushlight & Co., were undertaken at the suggestion of Nicholas Jaureguy, attorney for Cash Cole, and W. A. Rushlight, immediately after the trial was continued on October 6, 1953. (Mortensen, TR 71; Henderson, TR 87, par. 2; Diamond and Zinn, TR 93, par. 2; Rushlight, TR 166-167; Nowell, TR 97-98, 235-236.) Cash Cole himself indicated that he desired a settlement. (TR 154, 163, 167-168.) The following persons participated in said negotiations directly: Nicholas Jaureguy, attorney for Cash Cole; John E. Hedrick, attorney for Nowell; W. A. Rushlight; the appellants Cliff Mortensen

and Frank Henderson, and their attorneys, Joe Diamond, Earle Zinn and Walter Sczudlo. Cash Cole was kept posted on the nature of these negotiations through his attorney Jaureguy and Rushlight. (TR 166-170, 134, 71-75; TR 87, par. 2; TR 93, par. 2; TR 235-236.) Several compromise plans were considered, containing the basic provisions embodied in the ultimate settlement evidenced by the stipulation filed in this cause on October 9, 1953. (TR 166-170, 97-99; TR 71-75; TR 87, par. 2; TR 93, par. 2; TR 140-141.)

Cash Cole denied that his attorney, Jaureguy, made the settlement, but states that Cake made such settlement (TR 157, 162); and further states that he did not talk to his attorney during these negotiations. (TR 60, 135.) Yet it appears in the record in this case and from his own admissions that Cake and Jaureguy of the firm of Cake, Jaureguy and Hardy, represented him in this case at the time of these negotiations. (TR 143.) Tom Cole, however, contradicts him and admits that he conferred with Rushlight and Jaureguy regarding the terms of the final settlement prior to its execution. (TR 134.) Others participating in these negotiations have sworn that Cash Cole was advised of the progress and nature of these negotiations and talked to his attorney Jaureguy, and to Rushlight. (TR 166-170; 97-99, 71-75; TR 87, par. 2; TR 93, par 2.)

2. Reciprocal offer.

The several compromise plans considered during the negotiations were reciprocal in nature in that the Mortensens and Henderson were willing "to buy or

sell'' on the same terms and conditions, that is, to buy out the interests of the principal appellants in the appellee corporation and settle all conflicting claims, or to sell their interests in said corporation to the principal appellants and to settle all conflicting claims. (TR 140-141, 166-167, 71-73, 74-75; TR 87, par. 2; TR 93, par. 2; TR 237.) The final compromise evidenced by the stipulation filed October 9, 1953, in this case, was a similar "to buy or sell" offer, which Cash Cole elected to accept as a buyer.

3. Cole's capacity to do business.

Dr. Joseph M. Ribar was the only physician attending Cash Cole following his purported heart attack at the end of the first day of the trial. The doctor merely stated that at no time within one week after said attack was Cash Cole in a proper physical or mental condition to transact business matters, and admitted that he was unable to state as to whether Cole was mentally competent to transact any business matters after the expiration of 72 hours following his attack, that is, after October 7, 1954, since the patient was not examined to determine his mental competency. (TR 64-65, 94, 238.) Rushlight states in his affidavit (TR 170) that Cash Cole was fully aware of what was going on and understood each and every matter contained in the stipulation and all ancillary matters. He further states that he was advised of the progress of the negotiation and terms of the compromise plan not only by himself but likewise by his attorney Jaureguy. (TR 166-170, 71-75, 81-82.)

The affidavits submitted on behalf of appellants Cash Cole and the Bayview Realty, Inc., to vacate the decree contained conflicting statements with respect to his comprehension and capacity. Cash Cole, in his affidavit (TR 58), states that he did not ascertain the intent and import of said stipulation until about one month after the execution thereof. Tom Cole in his affidavit (TR 134-135) states, on the other hand, that it was "several days after the agreements and notes were signed" before Cash Cole ascertained the nature thereof. Ruth Cole in her affidavit (TR 141) states that Rushlight discussed with Cash Cole for "several days" the settlement negotiations, but in a subsequent paragraph states that it was "several weeks" after the stipulation was signed before he knew what it contained. Cash Cole swears in his affidavit (TR 58) that he was unable to read the stipulation for a period of one month after he signed it, because of the drugs administered to him. Dr. Ribar, however, states that the effect of said drugs was limited to approximately 72 hours after their administration, and that such effect would not continue for one month. (TR 94-95, 238.) Tom Cole admits in his affidavit (TR 137) that Cole could read after a week. It is noteworthy that in appellants' motion to set aside the compromise agreement and vacate the final decree (TR 52-56), and the various affidavits filed in support thereof there is no categorical statement or proof that Cash Cole was mentally incompetent to conduct the compromise negotiations, or to execute the compromise agreement contained in the stipulation. Rather, it is represented that he was

unable to read and was ill. Cash Cole in his first affidavit admits that he "relied upon the statements" of Rushlight as to the contents of the compromise agreement, and does not state that he did not comprehend such contents, or that he was mentally incompetent, but rather represents that Rushlight made false and fraudulent representations as to said contents. (TR 57.) There is nothing contained in said affidavit or in subsequent affidavits filed by Cash Cole (TR 143, 156) in which there is any indication that he did not discuss the terms and provisions of the settlement agreement before it was signed by him and by his attorney, Jaureguy.

4. Understanding of settlement by Cole family.

Cash Cole contends that his wife and Tom Cole were uninformed of the matters discussed and the final stipulation. (TR 60.) In his later affidavit he points out discussions between Tom Cole and W. A. Rushlight in which familiarity with the terms of the stipulation are shown by the former. (TR 157.) Tom Cole denied participation in the negotiations, but admitted that he talked to W. A. Rushlight and to Jaureguy, attorney for Cole, about the final settlement agreement. (TR 134.) He does not deny in his affidavits lack of knowledge as to the terms and conditions of the final settlement represented in the stipulation. (TR 61-64, 132-139.) Ruth Cole denies participation in the negotiations, but does not deny knowledge of the final settlement terms, but rather indicates that she did possess such knowledge. (TR 140-141.) Appellees' affidavits do not contain any

such conflicting representations, but unequivocally state that both Mrs. Cole and Tom Cole, as well as their attorney Jaureguy and W. A. Rushlight, had full knowledge of all of the negotiations and especially the terms and conditions of the final compromise plan embodied in the stipulation, which appellants sought to set aside. (TR 170, 71-73, 80-81; TR 87, par. 2; 237-238.)

5. Conspiracy and fraud.

In support of the motion seeking to vacate the final judgment on the ground of fraud and conspiracy, the principal appellants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions (TR 239-240) as follows: That appellees "acting in concert with one W. A. Rushlight" induced him to sign the stipulation, when he did not know the contents thereof (TR 57); that he relied on a false and fraudulent statement as to the contents of said stipulation made by "A. G. Rushlight Co." (TR 57); that he "believes" that the Mortensens, Henderson, Rushlight, and Nowell conspired to secure his stock in the appellee corporation knowing that he could not make the payments provided in the stipulation, demand note and agreement (apparently the demand note was the one to Rushlight and the agreement was the one with Nowell, neither of which had any place in the stipulation involved in this cause) (TR 59); that Mortensen, Henderson and Nowell, acting in concert with Rushlight began negotiations with Cash Cole to sell *their stock* to Cole (TR 62); that it was evident to Cash Cole that the "plaintiffs

had concocted a scheme" to secure not only the profits from contracts of construction, but also over \$1,000,000.00 by failing to do the work, etc., (TR 148); and that reading of Nowell's letter of May 24, 1951 criticizing actions of Cash Cole, made it clear to him that Nowell's responsibilities as a director in Bayview Realty, Inc., and Fairview Development, Inc., were secondary to his personal affairs. (TR 151-152.)

On the other hand Cole admits in contradiction to the existence of a conspiracy in which Nowell participated that Nowell filed a suit seeking damages in the sum of \$690,000.00 against the Mortensens and Henderson in Seattle, to improve "bargaining" position against said appellees. (TR 143-144, 154.)

The other parties to the negotiations deny any such conspiracy, fraud, or other charges and in their affidavits set up the ultimate facts leading up to the settlement and stipulation. (TR 166, 170, 95-100, 80-81; TR 87, par. 2, 3; TR 93, par. 2; TR 240-241.)

It is noteworthy to consider the number of parties to this cause and their counsel involved in the negotiations. Such counsel Cole implies or charges were parties to fraud or conspiracy. The negotiations for settlement were conducted by Nicholas Jaureguy, as attorney for Cash Cole and Bayview Realty, Inc.; John Hedrick, attorney for Everett Nowell; W. A. Rushlight, acting as representative for A. G. Rushlight & Co.; Joe Diamond, Earle Zinn and Walter Sczudlo, attorneys for Nelse Mortensen, Cliff Mortensen, and Frank V. Henderson, and Fairview Devel-

opment, Inc., and other appellees. The following attorneys appeared of record for the appellants at the time of the trial and negotiations: Cake, Jaureguy & Hardy of Portland; Morrissey, Hedrick, Roberts & Dunham of Seattle; and J. Hellenthal of Anchorage. These several attorneys represented independent of each other the respective conflictive claims of the parties to this cause and conducted personally the negotiations. Nowell, Mortensen and Henderson personally participated in said negotiations. Cash Cole participated in them through his attorney, Jaureguy, and said Rushlight, and the various compromise plans were submitted from time to time to him personally. (TR 80, 98-99, 174, 166-169, 87; TR 93, par. 2; TR 235-236.)

Jaureguy, Cash Cole, and Rushlight gave careful consideration to the compromise plan for the purpose of: Purchasing the interests of the Mortensens and Henderson so as to gain control of Fairview Development, Inc., and Fairview Manor; settling the various claims of said parties against each other; securing the discharge of Robert E. Sheldon, receiver then recently appointed in this case; securing dismissal of other litigation pending between these parties; avoiding further trial in this case; and securing payment of the claims of lien of A. G. Rushlight & Co., Pilip and Butt Painting Contractors, Inc., and C. H. Keaton. (TR 81, 166-169, 236.) The interests of these various groups in this case were adverse to each other, and each group personally or through its attorneys, conducted the negotiations independently for its own

benefit, without misrepresentation, or opportunity for fraud, or attempt to overreach Cash Cole or any other parties involved for its own advantage, since all phases of said negotiations and proposed settlement were known to each of said groups, and to Cash Cole, his son, his wife, and Jaureguy, his attorney, who had full possession of all the facts and all of the corporate books of Fairview Development, Inc., during this entire period. (TR 80-81, 71-75; TR 87, par. 2; TR 166-170, 97-100, 181-182, 236-237.)

At all times the Mortensens and Henderson were willing to buy the interests of the principal appellants and settle all claims on the same terms and conditions as those contained in the final settlement agreement contained in the stipulation. (TR 167, 140-141, 71-73, 74-75, 237.) Cash Cole, however, would not sell but insisted on buying. (TR 167.)

6. Tenants antagonized—vacancies.

Cash Cole and his management had antagonized tenants at Fairview Manor. He had been arbitrary in his conduct toward them, resulting in many unnecessary vacancies and loss of income to the appellee corporation. (TR 88.) Tom Cole denied any such fact, but admitted that there were lease difficulties, and so did Cash Cole. (TR 137-138, 158.) The exact number of vacancies were admitted by Cash Cole to average from 55 to 71 apartments during the winter, with 71 vacancies on February 1, 1954. (TR 158, 145, 146, 155, 138.) Estimating the rental to be only \$115.00 per apartment that would range from

\$6,325.00 to \$8,165.00 *loss in income each month.* (TR 192-193.)

7. No impossibility of performing settlement agreement.

Cash Cole admits that the reason for failure to perform the settlement agreement and make the payments required thereunder was due to the 55 or more vacancies since November, 1953. (TR 158, 241.) Apparently this is the only reason for the statement in the motion to vacate the judgment and in the affidavit of Cash Cole (TR 53-54, 58-59, 241) that said settlement agreement was impossible to fulfill, and so was confiscatory or in the nature of a forfeiture of his interests. Tom Cole ties in the alleged impossibility of performing the stipulation involved in this case with the separate agreements made between Cash Cole, Nowell, and Rushlight, which were not involved in said stipulation, to which the appellees were not parties, and which had no part in this cause. (TR 134-135, 241.)

8. Ratification.

Cash Cole accepted the benefits of the performance of the terms and conditions of the settlement agreement by the Mortensens and Henderson resulting in the dismissal of various litigation hereinafter mentioned, payment by them of \$125,000.00 to A. G. Rushlight & Co., in case No. 7163, settlement and payment in the same cause of the claim of Pilip & Butt Painting Contractors, Inc., and release and settlement of other conflicting claims. No restitution had been offered by Cash Cole and Bayview Realty, Inc.,

or others in their behalf, to place the parties in the same position as they were at the time of the filing of said stipulation on October 9, 1953. (TR 85; TR 87, par. 2; TR 92, par. 2; TR 100, 172-176, 241.) Cash Cole had accepted as a fact the resignations of Mortensen and Henderson from the board of directors of appellee corporation in accordance with said stipulation and had placed Tom Cole and one other person on said board. He had also taken over the assets of Bayview Realty, Inc., and other benefits secured from the performance apparently by Nowell of his separate agreement with Cash Cole. (TR 100.)

COLE SOUGHT BENEFITS WITHOUT PERFORMING HIMSELF.

9. Mechanic's liens.

The following claims of mechanic's and materialman's liens had been filed, and foreclosure thereof was sought in case No. 7163, filed against Fairview Development, Inc., Nelse Mortensen-Alaska, Inc., and others, by A. G. Rushlight and Co.:

(a) A. G. Rushlight and Co., Inc.—Claim, \$344,973.30; attorneys' fees, \$35,000.00; and costs.

(b) Pilip & Butt Painting Contractors, Inc.—claim \$77,681.62, and interest accrued thereon; attorneys' fees, \$5,000.00; and costs.

(c) C. H. Keaton, d/b/a Keaton Paint Co.—claim \$17,349.44 and interest accrued thereon; attorneys' fees, \$2,000.00; and costs.

W. A. Rushlight would enter into no settlement of said Rushlight lien unless a settlement was likewise made with Cash Cole on terms and conditions

acceptable to said Cash Cole. (TR 87, 71-75; TR 92, par. 2; TR 242.) The stipulation filed in the subject case provided for assumption by the Mortensens and Henderson of said liens. Simultaneously with the filing of said stipulation, a stipulation was likewise filed in case No. 7163 in the trial court by the Rushlight Company and Mortensens and Henderson agreeing to the payment of \$125,000.00 in settlement of the Rushlight lien. Payment was thereafter made and an order was entered on November 20, 1953, dismissing the amended complaint of the Rushlight Company. On February 16, 1954, a stipulation was filed wherein Pilip & Butt Painting Contractors, Inc. certified to the settlement and payment of its claim and an order was entered on that date dismissing the cross-complaint of said claimant in said case.

Cash Cole (TR 156), however, denies that the Rushlight settlement hinged on his settlement, but admits that the \$125,000.00 was paid. He further states that no guaranty was given by Mortensens and Henderson as to payment of said liens prior to said settlement, and apparently this was of grave concern to him. (TR 151.) He was familiar, however, with the fact that these liens represented claims by subcontractors for work performed beyond that called for by the plans and specifications, and that \$478,000.00 was deposited in escrow by the Mortensens and Henderson to protect Fairview Development, Inc. as to payment of said liens in the event of foreclosure. (TR 151, 179-180, 313.) In contradiction to Cash Cole, Tom Cole states that the Rushlight lien was of no concern to Fairview Development, Inc. (TR 136.)

10. Litigation.

At the time of the trial, settlement and final decree in this case the following additional litigation was pending and subsequently settled by reason of said stipulation and performance thereof by the Mortensens and Henderson:

(a) *A. G. Rushlight and Co., a corporation, v. Nelse Mortensen-Alaska, Inc., a corporation, Fair-View Development, Inc., et al*, No. 7163, foreclosure proceedings above mentioned.

(b) *Nelse Mortensen-Alaska, Inc., a corporation, et al, v. A. G. Rushlight and Co., a corporation*, No. 3105, in the District Court of the United States for the Western District of Washington, Northern Division, to set aside mechanic's lien above mentioned, and for damages for failure to perform subcontractor's contract properly.

(c) *Nelse Mortensen, Cliff Mortensen and Frank V. Henderson, co-partners, d/b/a Nelse Mortensen-Alaska Co., et al, v. Pilip & Butt, Inc., a corporation, et al*, No. 44280, in the Superior Court of the State of Washington for King County, to set aside mechanic's lien above mentioned, and for damages for breach of subcontractor's contract.

(d) *Fairview Development, Inc., a corporation, v. Nelse Mortensen-Alaska, Inc.*, No. 3532, in the District Court of the United States for the Western District of Washington, Northern Division, for damages in the sum of \$699,912.27 sought against the Mortensen Construction Company, based upon exaggerated and groundless claims, where actually the amount

in dispute did not exceed the maximum sum of \$20,000.00. (TR 69-70, 321-324, 154, 172-176, 177-180, 243.)

11. Delivery of stock.

The settlement agreement contained in the stipulation (TR 38, par. 2; TR 41, par. 9) provided that all of the capital stock of Fairview Development, Inc. (except the 100 shares of preferred stock), consisting of 450 shares purchased by said Cash Cole, Nowell and/or Bayview Realty, Inc. from the Mortensens and Henderson under said agreement, and the 450 shares of stock owned by Bayview Realty, Inc. would be placed in escrow, as security for the payment of the sum of \$89,000.00 to the Mortensens and Henderson undertaken by Fairview Development, Inc. It was understood under said settlement agreement that all of said voting stock would remain in escrow so that in the event of any default the Mortensens and Henderson would be entitled to all of said stock as their own property, except said 100 shares of preferred stock. Cash Cole, Nowell and Bayview Realty, Inc. failed to deliver said stock in escrow for the purposes of said security. (TR 76-78; TR 87, par. 2; TR 93, par. 2; TR 371-373, 244.) Cash Cole and Tom Cole in contradiction to the specific provisions of the settlement agreement contend that the capital stock of Mortensens and Henderson covered by the settlement agreement should have been turned over to Cash Cole, as well as stock purportedly owned by Nowell (TR 152-153, 174-175, 136.)

12. Performance by Mortensens and Henderson.

Nelse Mortensen, Cliff Mortensen and Frank Henderson have fully performed all the terms and conditions of the settlement agreement, including: (a) Payment of \$125,000.00 to A. G. Rushlight & Co. in settlement of its claim in case No. 7163; (b) dismissal on November 20, 1953 of the Rushlight amended complaint; (c) settlement of the claim of Pilip & Butt Painting Contractors, Inc., and payment thereof; (d) making provision for defending against the claim of C. H. Keaton without cost to Fairview Development, Inc.; (e) securing dismissal of other suits pending in the State of Washington hereinabove mentioned; and (f) payment to Nowell of \$6,800.00 under stipulation (TR 40; TR 76, par. 12; TR 87, par. 2; TR 93, par. 2; 244-245.) Payment of said \$125,000.00 (TR 136), resignation of Mortensen and Henderson as directors "as per the stipulation" (TR 153-154) was admitted by Cash Cole, and there was no denial by him of the performance by the Mortensens and Henderson of the other conditions above mentioned.

13. Performance by Nowell.

Nowell (defendant in the trial court) had apparently performed the terms and conditions of the separate agreement existing between him and Cash Cole, which included the delivery of all of the capital stock owned by him of Bayview Realty, Inc. to Cash Cole, as well as turning over the minutes of West Juneau, Inc., and Gastineau Utility, Inc. (TR 99-100, 174-176.) Cash Cole, however, had defaulted under said agree-

ment. This, of course, presented no issue in this case, since it was not a part of the settlement agreement contained in the stipulation involved herein. (TR 245, par. 21.)

14. Defaults by appellants.

Bayview Realty, Inc., Cash Cole and Nowell had defaulted under the compromise agreement in the performance of the terms and conditions thereof, including: (a) failure to deposit all the capital stock of Fairview Development, Inc. (except 100 shares of preferred stock) aggregating 900 shares theretofore owned by said appellants, or one or more of them, or acquired under the terms of the settlement agreement, as security for the payment of the obligation of \$89,000.00 undertaken by Fairview Development, Inc.; (b) failure to pay \$6,800.00 at time of execution of settlement agreement and stipulation; (c) failure to pay \$3,200.00 on or before December 31, 1953; (d) refusal to permit Fairview Development, Inc. to pay said sum of \$89,000.00, the maturity of which was accelerated by the Notice of Default and Demand, (TR 371-373), dated February 9, 1954. (TR 76-78; TR 87, par. 2; TR 92, par. 2; TR 38, par. 2, 9, 11; TR 245, par. 20.)

IRRELEVANT MATTERS RAISED BY APPELLANTS.

The trial court pointed out in its order, (TR 245, par. 21) denying appellants' motion to vacate the final decree, that the parties in their affidavits in support and in opposition to said motion made reference to various irrelevant matters with respect to the in-

come of Fairview Manor Apartments, the appellees' knowledge concerning the financial condition of said project, the separate negotiations and settlement made between the appellants, Cash Cole and Everett Nowell, the execution by Cash Cole of a note in apparently the sum of \$25,000.00 to Rushlight and the business transactions between the appellant, Cash Cole and Everett Nowell, all of which the trial court considered as immaterial to the issues raised by said motion to vacate. The evidence concerning the said matters is summarized in the following paragraph 15, et seq., only to show the facts as disclosed by the proof with respect to these matters, since indiscriminate reference is made to them throughout the argument of the appellants in their brief, and to contradict their apparent effort by reference to these matters to picture Cash Cole as an innocent victim of some "scheme" to defraud him, and actually to disclose the ruthless, high-handed and selfish manner in which he dealt with the assets and income of the appellee corporation for his own benefit and use, and to show that his impassioned prayer for the equitable consideration of this Court is not only improper and not directed to the issues involved before this Court, but is not well founded.

15. Income.

Cash Cole sets out the income of Fairview Manor Apartments and the expenditures *at the end of November, 1953*, and that it was insufficient to make the payments provided in the stipulation involved in this case, as well as the payments required under

the Nowell agreement and the Rushlight note. The latter were no part of the settlement agreement involved in this case, and the only agreement before this court. (TR 58-59, 63; TR 245, par. 21.) It must be noted, however, that the affidavits of Cash Cole and Tom Cole make no reference to the income of the property at the time that the settlement agreement was made on October 9, 1953, and prior thereto, before they had driven off tenants to create the large number of vacancies heretofore noted in par. 6 *supra*. The appellees point out that the settlement agreement contains no provision that the payments due from Fairview Development, Inc. were to be derived solely from its income, but said settlement agreement specifically provided that Cash Cole, Nowell and Bayview Realty, Inc. would secure performance of said undertaking by pledge of all of the stock of Fairview Development, Inc. (TR 38, par. 2, 9; TR 78, par. 14; TR 87, par. 2; TR 181, par. 10.)

16. Cash Cole—Nowell agreement.

Apparently during the negotiations involving the settlement in this case, other negotiations were carried on between Nowell and Cash Cole to sell the interests and claims of Nowell in Fairview Development, Inc. to Cole. Separate contracts and releases apparently were likewise drafted and executed by these parties, but were no part of the settlement agreement involved in this case or in issue. (TR 99, 167-170, 148, 58, 62-63; TR 83, par. 19; TR 245, par. 21.) Apparently Cole questioned the legality of

the settlement agreement with Nowell, but such dispute had no place in this proceeding.

17. Cash Cole—Rushlight note.

It seems that also as a result of the consummation of the settlement in this case, and the separate settlement between Nowell and Cole, it was necessary to guarantee certain payments to Nowell by Cole in the sum of \$20,000.00 and to pay \$5,000.00 to John Hedrick, attorney acting for both Cash Cole and Nowell. Rushlight and Cash Cole apparently agreed orally that Rushlight would cause to be paid all sums of money necessary to effect the transfer of stock from Nowell to Cole and to guarantee payment of said sum of \$20,000.00. For this Rushlight received a note from Cash Cole in the sum of \$25,000.00 and an assignment of the interest in the appellee corporation assigned by Nowell as security for the payment of said note. This agreement and note between Rushlight and Cash Cole were not involved in these proceedings nor under the settlement agreement and stipulation made herein. (TR 168-170; TR 84, par. 21; TR 148, 157; TR 84, par. 21; TR 245, par. 21.) It seems that Cash Cole also questioned the legality of his agreements and his note with Rushlight. (TR 57-58, 62.)

18. Purported contractors' shortages and errors.

Cash Cole by way of general conclusions without stating ultimate facts, reiterated claims upon which said suit No. 3532 was based (par. 10, *supra*), and which was dismissed with prejudice. (TR 399-400.)

Said suit sought damages for \$699,912.27. (TR 386.) It was based on excessive and unreasonable claims involving purported defects in construction. The total amount actually in dispute did not exceed the maximum sum of \$20,000.00 (TR 324, par. 10, 9(b); TR 177, par. 2, 3, 5 and 8; TR 332-333; TR 245, par. 22.) Cash Cole had doubled the amount of the same claims made in case No. 3532, incorporated them in a cross-complaint *lodged* in this case on February 23, 1954 (TR 132), which the *trial court denied leave to file* (TR 254, par. 2), and then contended that there were shortages under the construction contract performed by the Mortensen Company, in the sum of \$1,356,043.15 and \$380,525.44. (TR 144, 148, 136; TR 245, par. 21.) The construction contract, however, only involved \$3,080,000.00 all told. Errors in construction in the aggregate sum of \$141,000.00 are claimed by him. (TR 145, 133.) All of these claims and counterclaims were the subject of the settlement involved in this case and were mutually released by the parties hereto. (TR 41, par. 7.) They were also all involved in said case No. 3532, and by stipulation said case was dismissed October 28, 1953, *with prejudice*. (TR 375-398, 399-400; TR 246, par. 22.)

Of course, the appellees deny misappropriation of any funds in construction of Fairview Manor, and show completion of such construction in accordance with the plans and specifications and unequivocally deny all the reckless charges and claims made by Cash Cole. Such construction was inspected and approved by FHA, including materials used and the work per-

formed, before it would insure the mortgage on the project. (TR 332-333, 177-178; TR 324, par. 10.) Cash Cole from time to time complained of construction deficiencies, but these, on analysis, were not inadequacies of construction, which passed FHA inspection and were approved and accepted by it, but rather involved inadequacies of plans and specifications furnished by Cash Cole and his architect. (TR 177, par. 2, 3, 5, 8.)

MISCELLANEOUS.

19. Ownership of stock.

At the time of the settlement and entry of final decree in this case, the appellees, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson owned collectively 450 shares of capital stock of the appellee corporation, representing 50% of the voting stock. (TR 67, par. 2.) Bayview Realty, Inc., was the owner of the other 50% of said capital stock, consisting of 450 shares, and representing 50% of the voting stock. Cole and Nowell controlled Bayview Realty, Inc. (TR 67, 175, 167.)

20. Improper acts of appellants in management.

The purpose of this suit filed by appellees was to resolve the deadlock in the conduct and affairs of appellee corporation, due to failure of the board of directors to proceed, to resolve the deadlock among stockholders and members of said board resulting in paralysis of corporate functions, to end dissension and discord in said board, to eliminate mismanagement and improper disposition of funds and

dissipation and misappropriation of assets and impairment of corporate property by the principal appellants. (TR 66, par. 1; TR 96; TR 93, par. 2; TR 3-15; TR 247, par. 23.) The proceedings at the trial and the deposition taken theretofore of Cash Cole, and the affidavits filed showed many improper acts in management by Cash Cole and members of his family and Nowell: (a) Purchase of auto parts out of funds of appellee corporation for Tom Cole (Nowell, TR 173, 149, 479-481, 490-491, 550, 556); (b) improper payment of monthly salary of \$1,000.00 to Nowell while he was employed full time by the Alaska Freight Lines in Juneau (TR 150-151, 336, 445, 495, 502, 512-514); (c) sending the daughter-in-law of Cash Cole on an extensive trip to the United States and for her personal benefit at the expense of appellee corporation (TR 173, 551); (d) expenditure of corporate funds for excessive long distance phone calls (TR 173-174, 337, 552-553); (e) payment out of corporation funds for vacation of Cole and members of his family (TR 174, 338, 528-532); (f) furnishing of a free apartment and bar for Nowell, which he only occasionally used, but was always available (TR 149, 502-504, 553-554); (g) apartments made available to members of Cole's family free of rent (TR 88, par. 4 c; TR 505-506, 149-150, 137); (h) exorbitant and unauthorized salaries paid to Cole and Nowell (TR 88, par. 4 b; TR 137, 149-150, 336); (i) inefficient management generally and numerous family members of Cash Cole on the payroll (TR 170, 173-175, 315-316, 470-478, 482-485); (j) unauthorized

control, failure to account, lack of stockholders' annual meetings and meetings of board of directors, and usurpation of the operation and management of Fairview Manor by the appellants, and dissipation of the assets and funds of the appellee corporation (TR 87, par. 4; TR 190-194); and (k) purchase of gifts at expense of appellee corporation from Cash Cole to Rushlight. (TR 552, 565.)

21. Amount of investment by Cole and Nowell.

The sole investment of Nowell and Cole in the Fairview Manor project for which they received 50% of the stock issued in the name of Bayview Realty, Inc., was securing a lease for 75 years on the land from the City of Fairbanks and a temporary commitment apparently for an FHA mortgage. (TR 160.) The Mortensens and Henderson undertook to secure a financial institution in Seattle to accept a mortgage, to construct the buildings as provided in the plans and specifications and in conformance with the requirements of FHA and mortgage limitations, and to guarantee performance under the construction contract. (TR 305, par. 1.)

**B. CONTROVERSIES EXISTING AT TIME OF FILING
SUIT, TRIAL AND SETTLEMENT.**

A statement of the controversies existing between the stockholders involved in this case, and the corporate directors and officers existing at the time of filing this suit, the trial and settlement, as well as other

circumstances has been prepared and is contained in the Appendix to this brief, without, however, waiving the position of the appellees that such controversies and circumstances have no bearing on the issue now before this Court.

It has been pointed out already in this statement following Section 14 thereof, that the purpose of touching on these matters is to contradict appellants' apparent effort to picture Cash Cole as a "good citizen," "deprived of his livelihood," deprived of his property, "brow-beaten," and otherwise subjected to a purported "scheme" to defraud him by his numerous attorneys and his associates in business, Messrs. Nowell and Rushlight, and to show the utter lack in fact or evidence of any foundation for such representations and contentions, and to reveal the true nature and conduct of Cash Cole in usurping control of the assets and income of the appellee corporation and the conduct of the affairs thereof "to suit himself," to control all of its funds, and to "pay himself an exorbitant salary and expenses" to the detriment and loss of not only said appellee corporation but the stockholders as well. (TR 315.)

Appellants in their brief devote a substantial portion thereof to these controversies and conflicting claims, which were settled by the compromise agreement and the stipulation filed in this cause (TR 38-43) and the final decree entered thereon (TR 45-46). These controversies and the purported claims of appellants concerning defects in construction at Fairview Manor are not at issue in this appeal, but ap-

pellants have attempted to bring them to the attention of this court in their brief and by references to their cross-complaint, which they asked leave of the trial court to file, after a trial in this suit had commenced and a final decree had been entered, and after the matters contained in said cross-complaint were *res adjudicata*, as more fully shown in Section II of the "ARGUMENT", *infra*. Such cross-complaint was only lodged (TR 132) and is not properly a part of the court record and proceeding, since the trial court denied leave to file said cross-complaint (TR 254, par. 2).

Numerous references to "documentation" of the appellants are contained in their brief. Their counsel apparently erroneously assume that citation to said cross-complaint and to other pleadings of the appellants constitutes such documentation. Great reliance is placed upon this purported "documentation" on said cross-complaint.

QUESTION INVOLVED.

Did the appellants establish any ground under *Rule 60 (b) of the Federal Rules of Civil Procedure*, by clear, unambiguous and convincing proof, so as to sustain their motion to rescind the compromise agreement and stipulation embodying the latter and to vacate the final decree based thereon?

SUMMARY OF ARGUMENT.**Introduction.**

- I. Appellants have not established any grounds to set aside their stipulation and settlement agreement and to vacate the final decree based thereon.
 1. Grounds alleged by appellants.
 2. Court can refuse to vacate decree.
 3. Burden of proof is on appellants.
 4. Appellants' affidavits are insufficient.
 - (a) Argumentative.
 - (b) Conclusions of fact, not ultimate facts.
 - (c) Conflicting.
 - (d) "Double talk".
 - (e) Assumptions without factual basis, or legal conclusions.
 - (f) Immaterial matters.
 - (g) Misleading statements.
 - (h) Primary effort of appellants' affidavits.
 5. There is no clear, unambiguous and convincing proof of fraud, conspiracy, or any of the other acts charged in the motion to vacate the decree.
 6. There is no clear, cogent and convincing proof that at the time of the execution of the stipulation and settlement sought to be rescinded Cash Cole was mentally incompetent.

- (a) Test of mental competency.
- (b) Presumptions.
- (c) Witnesses.

- 7. Cash Cole cannot secure rescission of the settlement agreement and the final decree, without restoring appellees to status quo.
- 8. Appellants affirmed or ratified the settlement agreement by failing to disaffirm it without delay and by accepting benefits thereunder.

II. The various matters which appellants attempt to raise in the cross-complaint lodged in trial court were *res adjudicata* and not in issue on the motion to vacate.

III. The propriety of the trial court's appointment of a receiver on May 7, 1954 to preserve the assets of appellee corporation, and prevent further injury to stockholders' interests is not an issue on this appeal.

- 1. Alaska statutory provision.
- 2. The court has inherent power to appoint a receiver at the instance of a stockholder for a going, solvent corporation on grounds of fraud, mismanagement, or dissensions.
- 3. Other circumstances justifying appointment of receiver.
- 4. Authorities cited by appellants are not in point.

IV. Questions pertaining to enforcement of trial court's final decree of October 10, 1953 and order entered May 7, 1954, all pertaining to matters adjudicated by said final decree, or said order, having no bearing on the grounds for the motion to vacate, are not in issue on this appeal.

ARGUMENT.

The only issue before this court is raised by the motion of the principal appellant, Cash Cole, and his captive corporation, Bayview Realty, Inc., to set aside the stipulation containing the settlement agreement filed October 9, 1953 (TR 38-44), and to vacate the final decree entered thereon, pursuant to Rule 60(b) of the *Federal Rules of Civil Procedure*. The appointment of receiver sought by appellees following the filing of said motion (TR 101-103, 183-187) was ancillary relief required by reason of appellees' defaults under said compromise agreement and to enforce the final decree (TR 45-46) and the order denying the motion to vacate entered May 7, 1954 (TR 252-258), and prevent any further injuries in the future. The appointment of the receiver under said order entered May 7, 1954 (TR 255, par. 5) has consequently no bearing on the issue now before this court, and is not an issue on this appeal. Similarly any other provisions of said order directing enforcement of the court's decision (TR 254, par. 2, 3, 4, 6-8) are not in issue before this court.

The appellants improperly attempt in their notice of appeal filed May 10, 1954 (TR 264) to appeal from the final decree entered October 10, 1953, since the time in which to appeal from said judgment had long expired. (Rule 73 (a), *Federal Rules of Civil Procedure*.) Their appeal can only be from the order entered May 7, 1954 (TR 254, par. 1) denying their motion to vacate said final decree. This is clearly pointed out in *Washington v. Sterling* (1952, Munic. Ct. App., D.C.) 90 A. (2d) 836, cited in appellants' brief at page 80 on a general legal proposition. The court in said case held that an appeal from an order denying a motion based on rule 60 (b), being substantially the same as Rule 60 (b) of the *Federal Rules of Civil Procedure*, did not bring up for review the judgment sought to be vacated, but it brought up only the question of whether the trial court erred in denying the motion to vacate.

It is also necessary to emphasize at the beginning of this argument that references by appellants to events transpiring on and after May 7, 1954 following the appointment of the receiver and to which they make reference in their brief, have no bearing on the question before this court on appeal. On October 10, 1953, when the trial court approved the compromise agreement entered into between the principal parties to this cause, the appellants were in possession of all of the assets of the appellee corporation and in control thereof and its income, and had been in possession of such assets and control of such income from the time that the apartment project had

been completed. All the appellees had at that time was the promise of the appellants contained in the compromise agreement to purchase their interest in the corporation, to direct certain payments promised by said corporation, to deposit all of the shares of stock of said corporation acquired by them or owned by them as security for their promises, etc. Appellees relied upon said promises in good faith and carried out their obligations under said agreement. Appellants immediately defaulted under some of the obligations undertaken by them under said compromise, and eventually all of such obligations. They continued, however, in possession of the assets of the appellee corporation and in control of the corporate income and its disbursement. They continued to enjoy all this time (since 1951) salaries and other benefits derived from the corporation, the amount of which were determined at their sole discretion. Such was the situation on December 17, 1953 when the firm of Cake, Jaureguy & Hardy filed notice of their withdrawal as attorneys for Cole, Nowell and Bayview Realty, Inc. (TR 371.) This same situation continued on January 8, 1954 when the present counsel for appellants filed their motion to set aside and vacate the stipulation and judgment based thereon. (TR 52-56.) It continued at the time that appellees served their notice of default and demand dated February 9, 1954 and filed February 13, 1954 with the trial court. (TR 371-373.) This situation continued while appellants were granted opportunity by the court to file affidavits in support of their motion to vacate the fina-

decree, and an opportunity for their counsel and opposing counsel to present oral arguments based on such affidavits and counter-affidavits.

It was not until May 7, 1954 when the order was entered denying appellants' motion to vacate the final judgment (TR 252-258), that the situation changed. Under said order the court further made provision to enforce its final decree of October 10, 1953 and granted, among other things, the motions of the appellees for appointment of a receiver, for the corporate assets and income, and directed that the certificates of stock pledged by the appellants as security for performance of their obligations under the compromise agreement be delivered to the appellees as their property in accordance with the terms and provisions of said compromise agreement. Said order of May 7, 1954 was entered after due hearing predicated on the motions of the respective parties then pending before the trial court and on the affidavits and counter-affidavits filed in support or in opposition to such motions.

Thus the situation existing since May 7, 1954 arises through no fault of the appellees, but is due to the defaults of the appellants under their compromise agreement and failure to abide by the terms and provisions thereof.

I. APPELLANTS HAVE NOT ESTABLISHED ANY GROUNDS TO SET ASIDE THEIR STIPULATION AND SETTLEMENT AGREEMENT AND TO VACATE THE FINAL DECREE BASED THEREON.

The final decree entered October 10, 1953 disposed of all the claims of the parties to this cause by approving and embodying their settlement agreement. (TR 45-46.) It cannot be vacated except on the grounds set forth in rule 60 (b) of *Federal Rules of Civil Procedure*:

“On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. * * *”

1. GROUNDS ALLEGED BY APPELLANTS.

The motion of appellants in a “shotgun” fashion, sets up the following grounds: (a) fraud; (b) mental incapacity of Cash Cole as a result of a heart attack (but this is not clearly alleged); (c) mistake, inadvertence, surprise, inexcusable neglect; (d) conspir-

acy to defraud by the Mortensens, Henderson, Nowell, and W. A. Rushlight; (e) stipulation and decree is unconscionable, impossible of performance, and confiscatory; (f) no authority by stockholders to execute stipulation; (g) separate agreements made with Nowell and Rushlight were without consideration; and (h) no ratification of stipulation by Cash Cole. Their affidavits only attempt to support grounds (3) and (6) under above rule.

2. COURT CAN REFUSE TO VACATE DECREE.

The refusal of the court to vacate a decree under this rule is within its discretion, and the exercise of such discretion can only be reviewed for abuse thereof. (*Greenspahn v. Joseph E. Seagram & Sons, Inc.*, (CCA 2) 186 F.(2d) 616); *Johnson v. Masonic Bldg. Co.*, (CCA 5) 138 F.(2d) 817, aff'g 51 F.Supp. 527.)

The authorities cited by the appellants in their brief (pages 17, 21 and 29) are not in point in this appeal since such authorities pertained to situations involving motions to vacate default judgments or consent judgments providing for assessment of damages or imposition of other demands upon the defendant or defendants involved in the particular case cited. It might be pointed out that quotations from such authorities by the appellants largely represent headnotes to the court decisions, and no effort is made to show the facts involved in said cases. In this cause there has been no default judgment or consent decree providing for assessment of damages or imposition of any demands only against the appellants. In this

cause there was a compromise agreement, which was merely approved by the final decree entered in this cause, and which decree in fact vacated an order appointing a receiver, which appellants desired.

Thus in *Assman v. Fleming*, 159 F.(2d) 332, 336, cited by appellants at pages 17, 29 and 80 of their brief, there was involved a consent judgment. This case is more fully noted in the next subsection.

1 *Freeman on Judgments*, 580 (5th Ed.), sec. 292, cited by appellants in their brief at pages 21 and 29, actually refers to default judgments or judgments by confession. The one sentence quoted from this text by the appellants at page 21 of their brief is lifted from the section dealing with various principles governing exercise of the court's discretion. Appellants have ignored the following from said text at the same page:

“It has been said that the discretionary power to vacate judgments, given by the statute should be exercised sparingly and only for the purposes furthering the ends of justice and not to relieve against slovenly preparation or careless trial of causes. While statutory provisions authorizing the vacation of judgments are remedial in character and intended to afford a speedy and efficient means of relief, yet they are not to be invoked so as to impair the attribute of certainty and finality which should attend all judgments, *and a judgment should never be annulled except upon due consideration based upon a clear showing.* On the other hand, it is generally recognized that the discretionary power of the court should be liberally exercised in furtherance of

justice, to the end that cases may be disposed of upon their merits rather than upon technicalities or fortuitous circumstances. It is the policy of the law and the purpose of the statutes here under consideration to give every person an opportunity to present his cause of action or defense upon the merits, and where he has been deprived of this opportunity *without fault on his part* to afford him relief. * * *” (Emphasis added.)

The same writer in sec. 291 of said text, p. 578, further states:

“Only in extreme cases is the action of the trial court likely to be reversed. But in a plain case there is little or no room for discretion, and if the appellate court is satisfied beyond a reasonable doubt that the court below came to an erroneous conclusion, its action will be reversed, even where a judgment by default has been set aside. * * * *if the facts are disputed, the finding of the lower court will be treated as conclusive on appeal*; and even when the facts are not questioned, its action will not be reversed, except where it clearly appears that the court’s discretion has been abused or that it has been exercised in an arbitrary manner.” (Emphasis added.)

Jergins v. Schenk, 124 P. 426, 162 Cal. 747, cited by appellants at pages 21 and 29 of their brief, involved a motion by defendant to vacate under California statute a judgment by default, on the ground of excusable neglect supported by affidavits. There was no *contradictory evidence submitted by plaintiff*. The appellate court merely held that the neglect of

defendant's representative was not so obviously without excuse as to warrant the appellate court in reversing the trial court's order permitting an answer and a trial on the merits.

Humphreys v. Idaho Gold Mines Development Co., 120 P. 823, 21 Idaho 126, 40 LRA (NS) 817, cited by appellants at pages 21 and 29 of their brief, also involved a motion by defendant under state statute to vacate a judgment by default, supported by an affidavit. Apparently there was no contradictory evidence again. The trial court granted the motion, which order was sustained on appeal.

3. BURDEN OF PROOF IS ON APPELLANTS.

The burden of proving fraud, mental incapacity, or any of the other purported grounds set up in their motion is on them. Grounds so alleged cannot be presumed, but must be proved by clear and convincing evidence. (*Assman v. Fleming*, (CCA 8) 159 F.(2d), 332, cited by appellants in their brief at pages 17, 29 and 80 on a proposition not in point in this case; see also *infra*, par. I, 5, 6; see also TR 248, par. II.)

The above mentioned case and others further require that the application to vacate the judgment be accompanied by a showing that the defendant has a meritorious defense to the action. This again presupposes a default judgment or a consent judgment, which is not the situation in this case. The appellants already had an answer on file (TR 15-20), when the compromise settlement was made and the final decree was entered on October 10, 1953.

The case of *Assman v. Fleming*, above mentioned, and cited by appellants at pages 17, 29 and 80 of their brief, is actually in point and supports the contentions of the appellees. This case was an appeal from an order denying a motion to vacate a consent judgment entered against the appellant. Suit had been filed by Fleming against the defendant for treble damages for violation of the Emergency Price Control Act. With the complaint a stipulation was filed signed by defendant waiving service, answer and defenses and hearing, and consenting to entry of judgment for \$5,061.01 and a permanent injunction. Judgment was entered on December 28, 1945, and the money part thereof was satisfied on the same day. On January 4, 1946, the defendant filed a motion to vacate said judgment and to enjoin payment on his check, alleging among other things that the plaintiff's agents had fraudulently represented that he had violated the Act, and had induced him to enter into the settlement agreement reducing treble damages from \$10,122.03 to \$5,061.01 on the representation that there would be no publicity, whereas the pleadings in the case had been published resulting in harmful publicity. Affidavits in support of said motion were filed, and the court permitted the defendant to tender an answer in which he generally denied plaintiff's complaint. The plaintiff filed a response to the motion putting in issue all allegations, and oral testimony was allowed by the court, arguments were heard and briefs were submitted. The trial court denied the motion to vacate and such de-

nial was upheld by the appellate court in the above mentioned case.

The court states at page 336, after considering Rule 60(b):

“* * * Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case. The burden of proving such fraud and misrepresentation is, of course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence. * * *”

The court in the same case at page 337 held that the defendant failed to sustain his charges of fraud, deceit, misleading or over-reaching contained in his motion to vacate, and stated:

“The findings of the court are presumptively correct and should not be reversed unless clearly erroneous. It was within the province of the trial court to pass upon the credibility of the witnesses and the weight to be given to their testimony. *Jackson County v. Duffy*, 8 Cir., 147 F.2d 227; *Kincade v. Mikles*, 8 Cir., 144 F.2d 784. The order of the trial court, being sustained by substantial evidence, could not be held to be an abuse of discretion. Conceding, as the trial court did, that defendant’s proffered answer pleaded a meritorious defense, *defendant is without standing here because the court has found that his charges of fraud and misrepresentation were untrue*, and it is not the province of this court to weigh the evidence nor to attempt to pas

upon the credibility of witnesses." (Emphasis added.)

In this same case the appellate court pointed out at page 338 that the only matter before the trial court in considering the motion to vacate the judgment was whether the judgment should be vacated because of the existence of the fraud, misrepresentation, and other grounds alleged by the defendant, and whether such defendant had proffered a defense on the merits. The latter was assumed to have existed, since an answer was filed, but it was held that the grounds for the motion had not been sustained.

4. APPELLANTS' AFFIDAVITS ARE INSUFFICIENT.

The affidavits presented by appellants in support of their motion to vacate the final decree are legally insufficient to establish any grounds on which said motion can be based under Rule 60 (b) above mentioned. (See TR 248, par. II.) The following insufficiencies, among others, are called to the court's attention:

a) Argumentative.

Cash Cole and other persons subscribing affidavits submitted by him often argue matters of law and reduction of fact. Thus Tom Cole urges that stock which, under the stipulation, was to be placed in escrow as security, should have been delivered to Cash Cole. (TR 135.) For examples of arguments by Cash Cole with respect to purported defects in building construction, which purported claims were consid-

ered in reaching the settlement in this case, as to voting rights of stockholders, and other matters, see affidavits of Cash Cole. (TR 145, 148, 157, 195-214.)

(b) Conclusions of fact, not ultimate facts.

All of appellants' affidavits fail to state ultimate facts, but generally just state the factual conclusions of the affiant.

(c) Conflicting.

Appellants' affidavits contain many conflicting assertions. Tom Cole (TR 135) states that "for three or four days no one was admitted to see Cash Cole, except affiant, Mrs. Cole and Dr. Ribar, and at no time during this period was any business discussed, * * *". Ruth Cole, however, (TR 141) states that Rushlight was talking with Cash Cole "over a period of several days" during the settlement negotiations.

Tom Cole (TR 134) affirms that he advised Rushlight and Jaureguay that it was impossible to perform the terms of the purchase agreement contained in the settlement terms. Yet, in the same affidavit he states that he had no "appreciable knowledge of the contents" of said settlement agreement. (TR 137.)

Ruth Cole certifies (TR 141) that Cash Cole did not have knowledge "for several weeks" of the terms of the settlement agreement. Tom Cole, however, (TR 134) states that Cash Cole knew after "several days" of the terms of said agreement.

Tom Cole (TR 137) denies that any exorbitant salaries were paid at Fairview Manor. Cash Cole,

however, (TR 149-150) admits that an exorbitant salary was paid to Nowell.

(d) "Double talk."

There is considerable duplicity in these affidavits. Thus Cash Cole (TR 157) states that his attorney Jauregui did not make the settlement, but that Cake made the settlement (TR 162-163). Yet, he admits that Cake, Jauregui and Hardy were attorneys representing him and other defendants. (TR 143.)

(e) Assumptions without factual basis, or legal conclusions.

Various legal conclusions are stated as matters of fact, and assumptions are asserted without any factual basis on which they are predicated being set out. For example, Cash Cole (TR 148) states that Rushlight had him "sign away his rights to Fairview Development, Inc." An examination of the settlement agreement contained in the stipulation clearly discloses that he purchased the interests and claims of the Mortensens and Henderson for a stated consideration, and put up all of the stock of appellee corporation acquired by him as security for the agreement of said corporation to pay off the conflicting claims, for certain releases, and for payment of the purchase price. (TR 38-44.) It is likewise obviously clear from the affidavits presented in opposition to this motion, as well as by the admission of Mrs. Ruth Cole, that the individual appellees were willing to buy out Cash Cole's stock and claims upon the same terms and conditions, but that he refused to sell. (See "Statement of Case", *supra*, par. 2.)

(f) Immaterial matters.

The appellants' affidavits contained many statements concerning immaterial matters that were not pertinent to the issue raised by their motion to vacate the decree. These have heretofore been noted in the "Statement of Case" following sec. 14, and involve various transactions between Rushlight and Cash Cole, between Nowell and Cash Cole, and between Kadow, Nowell and Cash Cole. Such transactions were no part of the settlement involved in this cause, or the subject matter of this cause, or the final decree. (See TR 152-155; "Statement of Case", par. 16, 17.) Similarly, various matters are raised concerning purported claims as to construction, etc., which were the actual matters considered in reaching a settlement in this case and in case No. 3532 pending at the time of the trial herein. (See "Statement of Case", par. 18.)

(g) Misleading statements.

In addition to the duplicity above mentioned, appellants' affidavits contain misleading statements. For example, Cash Cole (TR 161) speaks of voting rights and confuses the voting rights of stockholders with the voting rights of directors. The defendant Nowell (TR 174-175) points out another example of such misleading statements with respect to delivery of stock.

(h) Primary effort of appellants' affidavits.

An analysis of these affidavits, and a cursory examination of the cross-complaint lodged by them,

merely discloses that the sole object of their strategy, their arguments, unwarranted assumptions, references to immaterial matters, etc., is to revive the conflicting claims existing between the Cole group and the Mortensen group at the time this case was filed and at the time that the trial was commenced herein. (See "Statement of Case", par. 18, and Appendix.) These were the basis and reason for reaching the settlement evidenced by the compromise agreement. The reason for this strategy was the fact that Cash Cole had defaulted under that agreement, and by the terms thereof had lost ownership of the shares of stock, which were pledged as security for the performance of the undertaking to pay a total of \$90,000.00 to the Mortensen group, and there was no ground for an appeal from the final decree approving said settlement, and the time for an appeal had expired. It must be assumed that at the time this agreement was made on October 9, 1953, the Cole group contemplated making the payments.

The purpose of Cash Cole for entering into the settlement agreement was to secure: Complete control of appellee corporation; the discharge of the receiver then appointed by the trial court; payment of mechanic's liens then being foreclosed by A. G. Rushlight and Co., Pilip & Butt Painting Contractors, Inc., and C. H. Keaton; settlement of claims of various parties to this cause and dismissal of litigation pending between them; and to avoid continuation of trial in this case. The situation, however, changed shortly after said settlement agreement was made by reason

of Cash Cole's conduct in the management of Fairview Manor and his antagonizing of tenants, whereby a large number of vacancies occurred ranging from 55 to 71. This alone represented a minimum loss of gross revenue to the appellee corporation of from \$6,325.00 to \$8,165.00 a month. (See "Statement of Case", par. 6.) These amounts would have been more than ample to meet the obligation undertaken in the compromise agreement.

The sole purpose then of the appellants' motion was to extricate themselves from defaults under the settlement agreement and the loss of the stock pledged by them as security for the performance of said agreement. They sought the assistance of the trial court in equity, and now of this court, to perpetrate their scheme of avoiding their own promises contained in the stipulation, retaining all benefits derived thereunder, avoiding the effect of their defaults, and continuing in the illegal possession and control of the assets and income of the appellee corporation, using such assets and income for their benefit to the detriment and loss of the appellees.

5. THERE IS NO CLEAR, UNAMBIGUOUS AND CONVINCING PROOF OF FRAUD, CONSPIRACY, OR ANY OF THE OTHER ACTS CHARGED IN THE MOTION TO VACATE THE DECREE.

Fraud will never be presumed but must be proved by clear, convincing and unambiguous evidence. (*Alaska Northern R. Co. v. Alaska Central Co.*, 5 Alaska 377; *American Finance & Commerce Co. v. Gordon*, 1 P.(2d) 886, 164 Wash. 45; *Cerkonek v Dib-*

ble, (Wash.) 256 P.(2d) 488, 491; *Gonzelman v. Northwest Poultry & Dairy Products Co.*, 225 P.(2d) 757, 765, 190 Ore. 332.) The presumption is actually against fraud and it approximates in strength that of innocence of crime. (*Tecklenburg v. Washington Gas & Electric Company*, (Wash. 1952), 241 P.(2d) 1172; *Travelers' Ins. Co. of Hartford, Conn. v. Byers*, (Calif.) 11 P.(2d) 444, 447.)

Both the *Tecklenburg v. Washington Gas & Electric Co.*, (Wash. 1952), 241 P.(2d) 1172, see par. 6(c) *infra*, and *Handley v. Handley*, 243 P.(2d) 204, 172 Kan. 659, see par. 7 *infra*, are directly in point.

6. THERE IS NO CLEAR, COGENT AND CONVINCING PROOF THAT AT THE TIME OF THE EXECUTION OF THE STIPULATION AND SETTLEMENT SOUGHT TO BE RESCINDED CASH COLE WAS MENTALLY INCOMPETENT.

The proof clearly established that Cash Cole knew the nature, character and effect of his execution of the stipulation and understood the subject matter thereof and the transactions covered by said stipulation. ("Statement of Case", par. 3, 4, *supra*.)

It has already been pointed out in "Statement of Case", par. 3, that appellants' motion to set aside the compromise agreement and vacate the final decree (TR 52-56), and the various affidavits filed in support thereof do not contain a categorical statement or clear, cogent and unambiguous proof that Cash Cole was mentally incompetent to conduct the compromise negotiations, or to execute the compromise agreement contained in the stipulation. The strongest representation made is to the effect that he was unable to read

and was ill. Cash Cole admits that he "relied upon the statements" of Rushlight as to the contents of the compromise agreement, and does not state that he did not comprehend such contents, or that he was mentally incompetent, but rather represents that Rushlight made false and fraudulent representations as to said contents. (TR 57.) His subsequent statements do not contradict this fact. (TR 143, 156.) Any alleged action on the part of Rushlight which might have been fraudulent is not binding on the appellees, since they were not a party to it and there was no community of interest, nor was Rushlight an agent of the appellees, but rather the proof indicates was acting for Cash Cole with his consent and knowledge. Cash Cole has a remedy in court if he has suffered any damages as the result of any of Rushlight's acts.

There is likewise nothing contained in any of the affidavits signed by Cash Cole (TR 56, 143, 156) indicating that he did not discuss the terms and provisions of the settlement agreement before it was signed by him and by his attorney, Jaureguy. Obviously Cash Cole and Jaureguy would be the only persons who would have full knowledge on this matter. There seems to be some insinuation that Jaureguy and various other attorneys representing the appellants may be guilty of fraud or false representations to Cash Cole regarding the compromise agreement. Overlooking the fact that such insinuation is not clear, cogent and unambiguous proof, it must be again pointed out that Jaureguy did conduct the negotiations for Cash Cole, and was his attorney and

agent, and any misconduct on his part or the part of any other attorneys or agents representing the appellants and said Cash Cole specifically would not be binding upon the appellees, but would be binding upon the appellants, and for which they have an adequate remedy at law in a suit for damages. It might be observed, however, that Cash Cole recklessly charges all of his former associates, and apparently his attorneys, with misconduct, as well as the appellees. He fails, however, to support such charges with tangible proof, other than his own assertions and those of his son and wife.

The appellees were justified in relying on agreements reached with Jaureguy as attorney for Cash Cole and Bayview Realty, Inc., since he was acting for Cash Cole both at the trial and in the conduct of said compromise negotiations with the consent and approval of Cash Cole. It is noteworthy that Jaureguy refused to execute the stipulation and the compromise agreement contained therein until he had submitted it to Cash Cole for his personal consideration and secured his signature thereto. (TR 74.) It was not until December 16 or 17, 1953 that appellees received notice of the withdrawal of Jaureguy and his firm as attorneys for Cole, Nowell and Bayview Realty, Inc. This was more than two months following the execution of the settlement agreement. (TR 371.)

(a) Test of mental competency.

Old age, weakening of the memory and understanding and occasional strange and eccentric acts

are not themselves sufficient evidence of "mental incapacity", but the test is the ability to know the nature, character, and effect of one's acts and to understand the subject matter of business transactions in which one is engaged. (*Tecklenburg v. Washington Gas & Electric Co.*, (Wash. 1952) 241 P.(2d) 1172; *Beckley Nat. Bank v. Boone*, (CCA 4, 1940) 115 F.(2d) 513, rev. 32 F.Supp. 896, cert. denied 313 U.S. 558, 61 S.Ct. 835, 85 L.Ed. 1519.) A person, however old, or in failing health, so long as he retains appreciation of his possessions and relations to others may dispose of his property in any lawful way he sees fit and regardless of whether anyone may be pleased therewith. (*Tecklenburg v. Washington Gas & Electric Co.*, (Wash. 1952) 241 P.(2d) 1172; *Boardman v. Lorentzen*, 145 N.W. 750, 155 Wis. 566, 52 L.R.A. (NS) 476; *Sneathen v. Sneathen*, 16 S.W. 497, 104 Mo. 201; *Hughes v. Bullen*, 95 So. 379, 209 Ala. 134.) Mere weakness of mind or age, physical disability or abnormality do not constitute insanity under which contracts and conveyances of an insane person are rendered voidable. The line is drawn at actual insanity, as distinguished from weakness of mind unaccompanied by infirmity overthrowing reason. (28 *Am.Jur.* 701, sec. 66, 67; 1 L.R.A. 611; 35 L.R.A. (NS) 1092; *Pass v. Stephens*, 198 P. 712, 22 Ariz. 461; *Ralston v. Turpin*, 129 U.S. 663, 32 L.Ed. 747, 9 S.Ct. 420; *Argo v. Coffin*, 32 N.E. 679, 142 Ill. 368; *Stockmeyer v. Tobin*, 139 U.S. 176, 35 L.Ed. 123, 11 S.Ct. 504.)

(b) Presumptions.

The law will presume competency rather than incompetency, and every man is fully competent until satisfactory proof to the contrary is presented. (28 *Am. Jur.* 751, sec. 121; *Assman v. Fleming*, 159 F.(2d) 332.) Every man is presumed capable of managing his own affairs and is responsible for his own accounts. (*Isle v. Cranby*, 64 N.E. 1065, 1068, 199 Ill. 39, 64 L.R.A. 513.) It is presumed that every man is capable of understanding the nature and effect of his contracts. (*Spurlock v. Noe*, 43 S.W. 231, 19 Ky.L.Rep. 1321, 39 L.R.A. 775; Ann. 36 L.R.A. 723.)

(c) Witnesses.

The number, character and intelligence of witnesses and their opportunities for observation should be considered upon the question of insanity. (*Assman v. Fleming*, 159 F.(2d) 332; *Roxana Petroleum Corp. v. Colquitt*, 34 F.(2d) 470, aff. 49 F.(2d) 1025, cert. denied 284 U.S. 669, 52 S.Ct. 43, 76 L.Ed. 566; 28 *Am. Jur.* 763, sec. 135.)

The case of *Assman v. Fleming*, 159 F.(2d) 332 is in point, and has been heretofore noted in sec. I, 3. The case of *Tecklenburg v. Washington Gas & Electric Co.*, (Wash. 1952), 241 P.(2d) 1172 is also directly in point. The lessor in that case was 81 years old. She went to a mental sanitarium five months after the renewal of a lease, which was sought to be rescinded in said case. Under the lease renewal she had reduced the rent approximately in half. There was testimony concerning her mental condition by her attorney, a probate judge who knew her at the time that

she administered her husband's estate, two friends and neighbors, the manager of a department at her bank and a doctor, as to her apparent lack of mental capacity at the time of the execution of the lease. The court held that mental competency is presumed and evidence to establish incompetency must be clear, cogent and convincing. The best evidence in that situation would be that of a physician versed in mental diseases, but the court further held that he was mistaken as to her mental incapacity, since it appeared from the evidence that she possessed sufficient mind and reason to enable her to comprehend the nature, terms and effect of the lease transaction at the time of the execution thereof, and there was no overreaching.

In *Argo v. Coffin*, 32 N.E. 679, 142 Ill. 368, the court noted that as to mental capacity there was a great conflict in opinions of numerous witnesses, and impossible to tell on which side the preponderance was. Consequently, the presumption of competency was controlling, and the trial court was reversed.

Dr. Ribar in his affidavit (TR 65, 94) clearly stated that he did not examine the patient as to mental competency, but only as to his physical disability, and that he was not physically disabled from doing business after the expiration of 72 hours following his heart attack. Appellants in their brief, page 26, point out that the appellees procured and filed the doctor's last affidavit, but then contradict themselves at page 27 by saying that appellees presented no testimony of any physician. Obviously the first affidavit of the

doctor was procured by appellants. Rushlight in his affidavit (TR 170) states that Cash Cole fully understood the stipulation and the transactions involved and that Jaureguay, his attorney, explained the entire matter to him. Members of Cole's family admitted that the compromise was discussed with Cash Cole. ("Statement of Case", par. 3, 4, *supra*.)

7. CASH COLE CANNOT SECURE RESCISSION OF THE SETTLEMENT AGREEMENT AND THE FINAL DECREE, WITHOUT RESTORING APPELLEES TO STATUS QUO.

Appellees have completed performance under said agreement and the final decree entered thereon, but Cash Cole has not. ("Statement of Case", par. 12, 13, 14, *supra*.)

An incompetent person is in no event entitled, in equity, to a rescission or cancellation, on account of mental infirmity, as a matter of right, and if it appears inequitable in a particular case to set aside a conveyance or a contract on such grounds, there is no inexorable rule that it must be done. The circumstances of each case will govern the action of equity. (28 *Am. Jur.* 720, sec. 87; *Sprinkle v. Wellborn*, 52 S.E. 666, 140 N.C. 163, 3 L.R.A. (NS) 174, 179; *Coburn v. Raymond*, 57 A. 116, 76 Conn. 484.)

Under general principles of equity, it is generally held that before an equitable action to obtain rescission of a contract or deed tainted by fraud can be successfully prosecuted to completion and obtaining of relief, any money, property, or rights of action received thereunder should be restored, and in some jurisdictions, before even bringing the action, should

be tendered or offered in restoration of the status quo, since the fundamental object of equitable rescission is restitution and restoration of the parties to the position which they occupied before the transaction infected with fraud was negotiated and partially or completely performed. The well known equitable maxim that "he who seeks equity must do equity" has been stated in many cases to be the basis of the principle. (24 *Am.Jur.* 16, sec. 196.)

Restoration of status quo, or benefits is a prerequisite. A party seeking rescission of a contract or deed, in equity, must be willing to restore benefits which he has received thereunder before he can expect equitable relief. (24 *Am.Jur.* 81, sec. 250.) This equitable rule is supported by the great weight of authority. (5 *Williston on Contracts*, rev. ed., Williston and Thompson, 4288, sec. 1529; 28 *Am.Jur.* 716, sec. 84; Ann., 46 A.L.R. 419, 95 A.L.R. 1443.)

The case of *Handley v. Handley*, 243 P.(2d) 204, 172 Kan. 659, is nearly in point in this situation. In that case the plaintiff and defendant were twin brothers. The plaintiff about six months before he was committed to a state hospital for the insane for about three months upon the petition of the defendant, conveyed his farm to the defendant without consideration and under an oral agreement that his brother would look after the land and protect the plaintiff's interest therein, and reconvey it to the plaintiff when he had repaid his brother the money that he would advance on account of the realty. The defendant paid substantial sums for taxes and on account of the

mortgage, and also made permanent improvements. The plaintiff did not repay his brother for these advances and improvements, or even offer to pay. There was testimony of the doctor that at or about the time of the conveyance the plaintiff had suicidal and homicidal tendencies and it was his opinion that he was incompetent to transact business. There was also testimony of four other witnesses as to his incompetency at the time of the execution of the deed. This was contradicted by evidence that the plaintiff did comprehend the nature of the transaction concerned. The court refused to set aside the deed in view of plaintiff's failure to restore the benefits he had received, including moneys advanced by the defendant and payment for improvements made by him.

8. APPELLANTS AFFIRMED OR RATIFIED THE SETTLEMENT AGREEMENT BY FAILING TO DISAFFIRM IT WITHOUT DELAY AND BY ACCEPTING BENEFITS THEREUNDER.

There was no written repudiation of the settlement agreement served on appellees following execution of said stipulation on October 9, 1953 until January 8, 1954, when a motion was filed in this case to set aside the stipulation and vacate the decree, three months after the execution of said agreement and entry of said decree. During that period appellants permitted performance under said agreement and decree by appellees and accepted the benefits of such performance. ("Statement of Case", par. 8, 12, 13, 14, *supra*.)

Repudiation is essential. Disaffirmance of the settlement agreement, as well as an offer to return the benefits received by the purported incompetent, are

conditions precedent to a right to rescind such contract on the ground of incompetency or fraud. (28 *Am.Jur.* 709-710, sec. 77, sec. 56.) One who wishes to rescind must manifest his election to do so without undue delay, or the right will be lost, especially where there is further performance due under the contract from the other party, which in the absence of notice he might suppose would be accepted in spite of his prior breach or wrong-doing. (5 *Williston On Contracts*, rev. ed., Williston and Thompson, 4110, sec. 1469; *E. J. Albrecht Co. v. New Amsterdam Cas. Co.*, 163 F.(2d) 16.)

II. THE VARIOUS MATTERS WHICH APPELLANTS ATTEMPT TO RAISE IN THE CROSS-COMPLAINT LODGED IN TRIAL COURT WERE RES ADJUDICATA AND NOT IN ISSUE ON THE MOTION TO VACATE.

Cash Cole and Bayview Realty, Inc. lodged a cross-complaint and asked leave of court to file the same. (TR 103, 55.) Said cross-complaint purportedly includes Fairview Development, Inc. as claimant, and covers various purported defects in construction, which were the subject matter of case No. 3532 filed by Fairview Development, Inc. versus the individual appellees in the District Court of the United States for the Western District of Washington, Northern Division. ("Statement of Case", par. 10, 18, *supra*.)

In said case No. 3532 a stipulation was executed by the plaintiff and the defendants therein providing that said case "has been fully settled and compromised and that the same should be dismissed with

prejudice and without costs". An order was entered on October 28, 1953, whereby said case was "dismissed with prejudice and without costs". (TR 399-400; TR 246, par. 22.) Such dismissal with prejudice constitutes *res adjudicata* of the subject matter contained in the cross-complaint which appellants sought to file after trial had commenced and a final decree was entered. (30 *Am.Jur.*, sec. 161.)

It has already been pointed out and it is submitted that the subject matter of said cross-complaint was not in issue under the motion filed by appellants to vacate the final decree, and is not a proper matter for consideration on this appeal under the question involved therein. That question concerns only the sufficiency of the grounds for said motion, that is, whether fraud, mental incompetency, or any of the other reasons alleged by appellants had been established, by proper proof, so that the denial of their motion by the trial court was an error. The matters contained in said cross-complaint, which was only lodged in the trial court and not admitted therein, have no bearing on said grounds.

III. THE PROPRIETY OF THE TRIAL COURT'S APPOINTMENT OF A RECEIVER ON MAY 7, 1954 TO PRESERVE THE ASSETS OF APPELLATE CORPORATION, AND PREVENT FURTHER INJURY TO STOCKHOLDERS' INTERESTS IS NOT AN ISSUE ON THIS APPEAL.

The appellants devote considerable space in their brief, pages 62-74, to contending that the trial court erred in appointing a receiver for Fairview Manor

under the order entered on May 7, 1954, and cite most of their authorities under this point. This appointment has no bearing on the question before this court as to the sufficiency of the grounds necessary to sustain the motion of appellants to vacate the final decree of October 10, 1953, and the appointment of such receiver by the trial court to enforce its final decree and order of May 7, 1954 is not a proper matter for review on this appeal.

Regardless of this point, the following justification of the action of the trial court is noted:

1. ALASKA STATUTORY PROVISION.

The *Alaska Compiled Laws Annotated, 1949, 55-6-91* provide:

“A receiver may be appointed in any civil action or proceeding, other than an action for the recovery of specific personal property—

“First. Provisionally, before judgment, on the application of either party, when his right to the property, which is the subject of the action or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired * * *.”

“Second. After judgment, to carry the same into effect;”

It is obvious from the “Statement of Case” *supra*, that the rights and privileges of appellees as stockholders, which are the subject of this action, are the property rights involved in this cause, and were seriously affected by the conduct and actions of the ap-

pellants. In addition, those property rights as well as the appellees' right to profits earned by their investment in the appellee corporation had not only been impaired since the beginning of the business operations of said corporation, but were in danger of being lost or materially injured in the future.

2. THE COURT HAS INHERENT POWER TO APPOINT A RECEIVER AT THE INSTANCE OF A STOCKHOLDER FOR A GOING, SOLVENT CORPORATION ON GROUNDS OF FRAUD, MISMANAGEMENT, OR DISSENSIONS.

This rule is now well settled, although occasionally there have been some judicial expressions of opinion to the contrary. A court of equity has inherent jurisdiction at the instance of stockholders regardless of their number, in a proper case, to appoint a receiver for a solvent corporation, on the grounds of fraud, mismanagement, or dissensions among the stockholders, directors, or officers, if there is no other adequate remedy. (43 ALR, 246 and cases cited; 61 ALR, 1214, and cases cited; 91 ALR, 665-666 and cases cited; 19 CJS 1173.)

3. OTHER CIRCUMSTANCES JUSTIFYING APPOINTMENT OF RECEIVER.

On May 7, 1954, when the trial court denied appellants' motion to vacate the final decree, the appellees were entitled to take over the administration of the assets and income of the appellee corporation as its stockholders, to elect a board of directors, and to administer the assets of said corporation as they saw fit. The appellants, however, were in possession and wrongfully withholding such control and enjoyment

from the appellees and threatening further injury to their rights. All of the following circumstances were present and justified the appointment of a receiver:

(a) Large expenditures and extravagance.

In *Ashton v. Penfield*, 135 S.W. 938, 233 Mo. 391 (1910), it was held that the appointment of a temporary receiver and other relief falling short of dissolution of the corporation were proper, where the complainant owned 49 out of 100 shares of stock, but was denied access to the books of the company, which was being fraudulently managed by the husband of one of the other two stockholders who were defendants, under a conspiracy to secure the profits for themselves. The sole asset of the corporation was a business building, which the court said apparently rented readily, but had passed from a dividend-paying basis to a nondividend-paying basis, with no proper excuse. The court stressed the fact that the defendants were silent when fraud, extravagance, mismanagement, and oppression were laid at their door and were proved to exist; and stressed that the evils present were *not the mere product of ignorant inefficiency or mere differences of opinion in the administration of complicated and delicate affairs, but were the product apparently of design and a disposition and power to wrong*. See also *Ames v. Goldfield Merger Mines Co.*, 227 F. 292 (1915, DC). In the latter, it appeared that there were only four meetings of the board of directors in approximately four years, officers made no report to stockholders, no meeting of stockholders had been called for three

years, and \$250,000.00 was expended constituting practically all available corporate funds; so continuance of a temporary receiver held proper.

(b) Usurpation of corporate powers.

In *Brock v. Automobile Livery & Sales Co.*, 58 So. 21, 130 La. 404 (1912), it was held that a proper case for appointment of a receiver and the issuance of an injunction was shown where two brothers, owning one-half of the capital stock of a corporation,—the one holding the office of vice president and the other that of secretary and treasurer,—combined in antagonism to the third member of the corporation, who held the office of president and owned the other half of the stock, and, disregarding the charter and action of the board of directors, of which they were members, usurped all the power of the corporation and excluded their associate from the exercise of his rights as a stockholder, director, and president. The allegations that the affairs of the corporation were being mismanaged and that the interests of such associate were being jeopardized were held fully justified under these conditions.

(c) Personal gain and unnecessary salaries.

Where it is shown that the officers and directors of a corporation are mismanaging its affairs for their own personal advantage and gain, that the profits of the corporation are being absorbed by such mismanagement in paying the salaries of favored employees, whose services are unnecessary, and that such gross mismanagement, if continued, would result necessarily

in insolvency, a receiver should be appointed to manage the corporate affairs during investigation of the charges made in the complaint. (*Hall v. Nieu Kirk*, 85 P. 485, 12 Idaho 33 (1906).)

(d) Conversion through salaries and expenses.

It is well settled that a court of equity has jurisdiction at the suit of a stockholder to correct abuses of the corporate management by the board of directors, whether by way of unauthorized or fraudulent allowance of salaries for themselves and their confederates, either as directors or officers of the corporation, or by way of appropriating the assets to their own private uses. (*Gettinger v. Heaney*, 127 So. 195, 220 Ala. 613, 1930.) Improper or unauthorized salaries and expense charged by officers or directors of a corporation amount to conversion of corporate property, and are circumstances considered in justifying appointment of a receiver. So, in a suit by minority stockholders to compel an accounting of money and property belonging to the corporation, which the complaint alleged had been fraudulently converted to their own use by the officers of the corporation, who, it was alleged, were continuing to convert its money and property to their own use, as pretended salaries and expenses, without authority therefor, it was held in *Cameron v. Groveland Improv. Co.*, 54 P. 1128, 20 Wash. 169, that a receiver was properly appointed pending the litigation, and that the officers were properly enjoined from interfering with the property of the corporation during the pendency of the action. It was said that, if the facts specifically

stated in the complaint were true, the plaintiffs were entitled to the relief demanded.

It was held, also, in *Boothe v. Summit Coal Min. Co.*, 104 P. 207, 55 Wash. 167 (1909), that a temporary receiver should be appointed for such period as the trial court might fix, within which the differences between the parties might be adjusted by themselves if possible; and that if, at the expiration of such time, their differences were not adjusted, a permanent receiver should be appointed; that an accounting should be had, and excessive salary and profits withdrawn by the president should be returned.

In *Rugger v. Mt. Hood Electric Co.*, 20 P.(2d) 412, 143 Or. 193 (1933, rehearing denied 21 P. (2d) 1100, 143 Or. 225), the court cited with approval 43 ALR 242, and held that the court had jurisdiction to appoint a receiver for a solvent corporation at the instance of stockholders, where it appeared that the majority stockholders and promoters of the company had transferred to it, in exchange for its stock, property at a gross over-valuation, *that excessive salaries were being paid*, that the company had never paid dividends and was in imminent danger of insolvency.

(e) Illegal directors' meetings and lack of annual stockholders' meetings.

The holding of illegal directors' meetings and failure to hold annual stockholders' meeting will be considered as additional ground for the appointment of a receiver in a stockholders' suit. (*Gibbs v. Morgan*, 72 P. 733, Idaho, 1903; *Tulsa Torpedo Co. v. Kennedy*,

268 P. 205, 131 Okla. 159 (1928); *Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co.*, 64 F.(2d) 817, CCA-4, 1933; *Taylor Finance Corporation v. Oregon Logging & Timber Co.*, 241 P. 388, Or. 1925).

(f) Lack of corporate audit or statement.

Failure to provide a corporate audit or statement of corporate affairs and withholding a knowledge as to the corporate condition are additional factors justifying appointment of receiver in a stockholders' suit. (*Tulsa Torpedo Co. v. Kennedy*, 268 P. 205, 131 Okla. 159, 1926.)

(g) Scheme of unfair operations.

Where the facts disclose a scheme on the part of the directors or a majority of stockholders to wreck the corporation and dissipate its assets, the board of directors, who are, as to the stockholders, trustees of the corporation property and affairs, may be deprived of their power, "when, by fraud, conspiracy, or covetous conduct, or extreme mismanagement, the rights of minority stockholders are put in imminent peril and the underlying original corporate entente cordiale is unfairly destroyed." (*Gettinger v. Heaney*, 127 So. 195, 220 Ala. 613, 1930; see also *Tri-City Electric Serv. Co. v. Jarvis*, 185 NE 136, Ind. 1933.)

(h) Mismanagement justifies bringing suit to test matter.

The charge of mismanagement in a stockholders' suit, when supported by evidence, is sufficient to justify appointment of a receiver for the limited purpose

of continuing the suit to test the matter. (91 ALR 666.)

4. AUTHORITIES CITED BY APPELLANTS
ARE NOT IN POINT.

An analysis of the cases cited by the appellants shows that they fall into the following categories where the courts have refused to appoint a receiver: (a) Where it is only charged that officers or directors are taking excessive or illegal salaries (*Carey v. Dalgarn Construction Co.*, 130 So. 344, 348, 171 La. 246; *Horejs v. American Plumbing & Steam Supply Co.*, 297 P. 759, 161 Wash. 586); (b) where other remedies are available (*Skirvin v. Coyle*, (Okla.) 94 P.(2d) 234; *Ward v. National Ice Cream Co.*, (Mo.) 246 SW 554; *Kahan v. Alaska Junk Co.*, 189 P. 262, 111 Wash. 39); (c) where receiver is sought to redress past grievances, instead of future injuries (*Piser v. Grand Isle*, 60 So.(2d) 1, 221 La. 585); and (d) where a receiver prior to trial is not appointed until a full hearing is had on the charges made in the complaint (*Litz v. S. L. Knitting Co.*, 80 N.Y.S. (2d) 535; *Rabinowitz v. Steinberg*, 112 N.Y.S.(2d) 758; *Gillies v. Pappas Bros. & Gillies Co.*, 47 A.(2d) 424; *Neff v. Progress Bldg. Materials Co.*, 51 A.(2d) 443; *Riddle v. Mary A. Riddle Co.*, 54 A.(2d) 607; *Wood v. York Railways Co.*, 7 F.Supp. 665.)

On the basis of this analysis the appellees have no quarrel with the general legal propositions for which the above mentioned cases are cited by appellants, but submit that they are not in point in this case, both on the facts and on the issues that are involved.

IV. QUESTIONS PERTAINING TO ENFORCEMENT OF TRIAL COURT'S FINAL DECREE OF OCTOBER 10, 1953 AND ORDER ENTERED MAY 7, 1954, OR PERTAINING TO MATTERS ADJUDICATED BY SAID FINAL DECREE, OR SAID ORDER, HAVING NO BEARING ON THE GROUNDS FOR THE MOTION TO VACATE, ARE NOT IN ISSUE ON THIS APPEAL.

Section I of the "Argument" of this brief has covered the points raised in appellants' brief under their Sections I, II, III and XIII. Section II of our "Argument" covered point IX of their brief, and Section III covered point XI of their brief. This section covers all of their remaining points, namely: IV, V, VI, VII, VIII, X and XII.

It should be observed that appellants emphasize Cash Cole's purported heart attack and subsequent illness, following his testimony on the first day of the trial. The reason for such heart attack can be readily ascertained merely by a cursory examination of his testimony (TR 462-535), showing the various acts of mismanagement, misappropriation of corporate funds and assets, his efforts to hedge, his contradictions, etc.

It should also be observed that appellants' brief is ambiguous as to their concept of "documentation", which apparently refers to their pleadings, such as their cross-complaint lodged in the trial court and motion to vacate; attempts to ignore the testimony of Cash Cole, which testimony would constitute admissions that are binding and conclusive on such party (31 CJS 1173, sec. 381); criticizes the trial court for giving weight to proof submitted by appellees rather than proof submitted by appellants;

contains many reckless statements which can not be supported by the record or the evidence before the trial court, which are so numerous that it is impossible to attempt to refute each. For example, at the bottom of page 53 it is stated without any basis or reference to the record that "Nowell, as clearly appears from the evidence, was well paid by the plaintiffs for his part in the conspiracy." And again at the bottom of page 57 it is stated that the claims of the appellants have been fully explained in their affidavits "and have been set out in detail in the cross-complaint, and never denied and should have been accepted as the truth". The only reference is to TR 103-131, which is their cross-complaint, unsupported by any evidence, and which the trial court did not permit the appellants to file. It is also important to note that there is nothing contained in the "Statement of Case" presented by appellants to support their claim of fraud or conspiracy at the time of the execution of the compromise agreement.

All the matters covered by points IV (p. 38), V (p. 41), VI (p. 44), VII (p. 53), VIII (p. 55), X (p. 58), and XII (p. 75) have no bearing on the question before this court, and it is deemed unnecessary to extend the length of this brief by attempting to analyze and meet the arguments therein contained. All of the findings of fact, contained under these points, and which appellants contend are erroneous, pertain to the enforcement on and after May 7, 1954 of the final decree entered by the trial court on October 10, 1953 and its order entered on May 7,

1954, or pertain to matters adjudicated by said final decree or said order, which have no bearing on the sufficiency of the grounds alleged by the appellants necessary to support their motion to vacate said final decree and set aside the compromise agreement approved thereby. It is further submitted that the facts set out in the "Statement of Case" and heretofore considered in the "Argument" will likewise show that these points made by the appellants have no merit in fact as well as in law.

CONCLUSION.

The appellants have failed to show that the trial court erred in its findings of fact pertinent to the question on this appeal, or its conclusions of law because they had failed to establish any grounds under rule 60 (b) of the *Federal Rules of Civil Procedure* necessary to sustain their motion to rescind the compromise agreement and stipulation embodying the latter, and to vacate the final decree based thereon. They have not shown by clear, cogent and unambiguous proof any fraud, conspiracy, lack of comprehension due to illness, or other grounds recklessly charged by them. Their affidavits containing purported proof of these grounds have been merely argumentative, replete with conclusions of fact and not ultimate facts, conflicting as to matters stated by members of the Cole family, contained much duplicity, frequently made assumptions without factual basis or contained legal conclusions and contained many im-

material matters not pertinent to the issue before the court. The character of these affidavits and the reckless nature of the charges made, as well as the similar nature of their argument in their brief, merely indicate an effort on the part of these appellants to prolong their usurpation of corporate powers and retention of possession of Fairview Manor and collection of the income and profits thereof for as long as possible, as well as to avoid the defaults committed by them under the settlement agreement embodied in the final decree. They seek to accomplish that purpose by prolonging further the litigation herein through reckless and unfounded accusations, not only against the appellants in this case, but also against their former associates and indirectly against all the attorneys that have been involved herein prior to the present attorneys representing said Cash Cole.

Dated May 16, 1955.

LYCETTE, DIAMOND & SYLVESTER,
COLLINS AND CLASBY,
JOSEF DIAMOND,
WALTER SCZUDLO,
Attorneys for Appellee.

(Appendix Follows.)



Appendix.



Appendix

CONTROVERSIES AND CIRCUMSTANCES EXISTING AT TIME OF FILING SUIT, TRIAL AND SETTLEMENT.

1. Inception of Fairview Development, Inc.

Everett Nowell and Cash Cole desired to organize Fairview Development, Inc., for the purpose of obtaining a long term lease upon the land on which the Fairview Manor stands for the purpose of erecting the latter. They were not builders, and did not have the necessary construction ability or knowledge, nor the capital and financial standing to obtain such lease and to build such apartment project. Accordingly, they negotiated with the appellees, Cliff Mortensen, Nelse Mortensen and Frank V. Henderson, to undertake the organization of said corporation with them, to secure a leasehold, to obtain an FHA insured mortgage loan of \$3,080,000.00 for the project, and to construct a 272-unit apartment project. The individual appellees were unwilling to enter into the project without securing a controlling interest in the corporation, but finally it was agreed that 50 per cent of the stock of the appellee corporation would be owned by Bayview Realty, Inc., and the other 50 per cent of the common stock would be owned by said Cliff Mortensen, Nelse Mortensen and Frank V. Henderson. It was then likewise agreed that control on the Board of Directors would be equal, as evidenced by the agreement concerning said control, more fully indicated in paragraph 5, *post*. (TR 280, par. 4; TR 304, par. 1; TR 21, par. 3, 5; TR

333-334.) It was the credit and financial standing of the individual appellees above named and their construction facilities and ability, which made this project an actuality. (TR 304, par. 1, 6.)

2. Stockholders.

(a) Division of stock.

Said individual appellees at the time of filing this suit each owned 150 shares, or a total of 450 shares of the common capital stock of the appellee corporation. This represented 50 per cent of the voting stock of said corporation. The other 50 per cent of the common stock of the appellee corporation, comprising 450 shares and representing 50 per cent of the voting stock, was owned by Bayview Realty, Inc., or by it and Cash Cole and Everett Nowell, who controlled said Bayview Realty, Inc. (TR 280, par. 5, 6; TR 21, par. 2; TR 304.) There are also 100 shares of preferred stock of the value of \$100.00 each, issued to the Federal Housing Administrator, in connection with the procurement of the FHA insured mortgage. (TR 21, par. 2.)

(b) Deadlock.

From the inception of the appellee corporation and the Fairview Manor project, disagreement and dissension arose between the Mortensen interests and the Cole interests, resulting before the expiration of 1951, in a deadlock among the stockholders as to the management and conduct of the corporate affairs. (Complaint, XV, TR 11, par. XV; TR 280, par. 10; TR 317, par. 2, 6; TR 333-335.) No decision or

agreement could be reached between them on various matters vitally affecting the welfare and best interests of said corporation. Since the common stock was evenly divided between the opposing factions, as well as the directorate control, an impasse arose and continued to exist. The existence of this deadlock and dissension was uncontradicted by the opposing affidavits of the appellants.

(c) Settlement.

Although the agreement concerning directorate control (see par. 5, *post*), provides for arbitration, the dissension prevented reference to the Arbitrators. (Complaint, TR 19, par. XI, XII, XV; TR 360.) Unsuccessful efforts to settle the differences existing between the stockholders were made some time prior to the filing of the complaint, and continued thereafter. (TR 317, par. 6.)

(d) Litigation.

The existence of the deadlock and dissension among the stockholders was further evidenced by the costly litigation involving them. (See "Statement of Case", par. 10.)

3. Stockholders' meetings.

No annual meetings of stockholders had been held as required by the by-laws and the articles of incorporation, nor special meetings. (TR 280, par. 7(h); TR 317, par. 5, 15.) The opposing affidavits of the appellants do not contradict this fact.

4. Board of Directors.

(a) Deadlock.

A similar deadlock and dissension existed on the Board of Directors as among the stockholders on matters vitally affecting the welfare and best interests of the appellee corporation and the conduct and management of its corporate affairs. (Complaint, TR 11, par. XV; TR 280, par. 10; TR 317, par. 2, 6; TR 314, 360.) The opposing affidavits of appellants had not contradicted the existence of said deadlock and dissension, but had admitted its existence: By reference to the disagreements that existed among the directorate (TR 21, par. 16, 17, 18, 19; TR 288, par. 4, 5); or by ignoring the existence of the agreement concerning equal directorate control of the corporate affairs (see par. 5, *post*); or by a general statement that meetings of directors were called and minutes kept. (TR 21, par 15.)

(b) Directors' meetings.

Proper meetings of the Board of Directors pursuant to the provisions of the by-laws were not called. Meetings relating to corporate affairs were called and conducted by Cole and Nowell without notice to the individual appellees, contrary to the provisions of the by-laws and the General Laws of the Territory of Alaska. (TR 304, par. 1; TR 21, par. 15; TR 317, par. 15; TR 360.) Thus the Board of Directors' meeting of August 3, 1951 (TR 21, par. 10, 14; TR 290) was a self-serving meeting improperly called, of which the appellees had no notice, and at which Cliff Mortensen

was not present. (TR 304, par. 2.) This is further corroborated by the fact that the agreement concerning management purportedly resulting from said meeting, dated December 1, 1951, was only executed by Nowell and Cole, but was not signed by Cliff Mortensen as vice-president in the place provided for his signature. (TR 295; TR 304, par. 2.)

(c) Board of Directors' meeting, October 29, 1952.

The deadlock and controversy existing between the members of the Board of Directors and the breach of the agreement concerning control by said board of the corporate affairs (par. 5, *post*) is further evidenced by the conduct of the meeting held October 29, 1952. (Complaint, TR 11, par. XV; TR 21, par. 19; TR 304, par. 10; TR 360.) [There was a complete lack of harmony at said meeting and recriminations and ill feeling between the members of said board.

(d) Litigation.

A further illustration of the deadlock and dissension existing among the directors is shown by the litigation mentioned in the "Statement of Case", par. 10.

5. Agreement, June 16, 1950, directorate control.

At the inception of the appellee corporation (see par. 1, *supra*) and negotiations, a written agreement dated June 16, 1950, was executed by Cash Cole, Everett Nowell and Bayview Realty, Inc., as the first party, and Cliff Mortensen as the second party, wherein it was provided that the former, collectively, would have one vote on the Board of Directors, and

the latter would have one vote on said Board; and that any action requiring approval of the appellee corporation must have unanimous approval of these two groups.

This agreement further provided that in the event of the inability of the parties to agree on matters affecting the welfare of the corporation, such matters would be referred to Ken Kadow of Juneau, Alaska, for decision, or in the event of his non-availability, then to Roy Sumpter, and that the decision of either of said individuals on such matters, which were referred and were in disagreement, would be binding on all parties to said agreement. (TR 304, par. 1; Complaint, TR 8, par. XI, XII, XV.) The existence of said agreement and the breach thereof by appellants have not been contradicted by their opposing affidavits.

6. Officers.

Deadlock.

The officers of appellee corporation had been unable to agree upon matters affecting the life and corporate affairs of Fairview Development, Inc., just as in the case of the stockholders and the directors. (TR 280, par. 10; Complaint, TR 11, par. XV; TR 317, par. 2; TR 314.)

7. Usurpation of control and possession.

Cole and Nowell usurped control of appellee corporation and the Fairview Manor project. They took possession of said project without authority of the stockholders or directors, and conceived of said project as being their own to be operated for their sole benefit,

financially and otherwise, without recognition of the rights of the individual appellees, then owners of 50 per cent of the stock in said corporation. They had controlled said project for their individual benefit without consulting or advising the Mortensen interests. (TR 304, par. 1; TR 314; TR 317, par. 6, 7, 8.) The following are some of their unauthorized acts, among others: Collection of rentals without proper accounting; payment of salaries and personal expenses; occupancy of apartments without payment of rent and furnishing of said apartments at expense of appellee corporation even to the installation of a bar; payment of expenses and numerous long-distance calls for themselves and their families while visiting outside the Territory; ignoring the articles of incorporation, by-laws and General Laws of the Territory of Alaska concerning the conduct of corporate affairs; incurring extraordinary and capital expenditures; determining corporate policies; refusing to call or hold annual meetings of stockholders; failing to keep proper corporate records and minutes; holding only self-serving meetings of Board of Directors without notice to the Mortensen interests; and incurring numerous legal expenses by unauthorized litigation. (TR 280, par. 7(a)-(j); TR 290; TR 317, par. 2, 12; TR 335-339; TR 551, 435-441, 552, 565, 553, 502-506, 555, 528-532.) The appellees justify their actions on the ground that as officers and directors "and as individuals" (TR 21, par. 11, 12) they have used their best efforts and energy in managing the housing development, and it was necessary that they manage such project. They do not show the grounds for such general justifica-

tion; merely deny the fact that the Mortensen interests had been ignored, or that the project and the assets of appellee corporation were converted to their own personal benefit and use.

8. Unauthorized extraordinary and capital expenditures.

Extraordinary and capital expenditures have been made by appellants without authority of stockholders or Board of Directors given at a properly called meeting or meetings. (TR 280, par. 7(f), 9; TR 21, par. 13; TR 300; TR 304, par. 3; TR 317, par. 2, 4; TR 314.) The amounts of money spent are admitted in the affidavits filed by appellants as "staggering". (TR 21, par. 18; TR 33.) An analysis of the amounts expended appears in the affidavit of Campbell, acting for the first mortgage owner, and the letter attached thereto. (TR 330-348.) Said letter compares the expenditures made at the Fairview Manor project by appellants with that of another apartment project in the city to show how much higher such expenditures are, and admits that some of these expenditures "reflect in some degree the management's philosophy". (TR 345.) It is noted that for the year 1952 the administrative expense per room at a comparable project was \$26.89, whereas at Fairview Manor it was \$72.19; that the operating expense was \$102.13, whereas at Fairview Manor it was \$158.04; and that the maintenance expense was \$50.60, whereas at Fairview Manor it was \$58.34. The total operating expense per room on a comparable project was \$181.72, whereas at Fairview Manor it was \$288.61. Real estate taxes were more than double on the Fairview

Manor project, with no showing as to any steps taken to cure the situation. (TR 343.) Campbell's affidavit explains the complimentary comment in his letter mentioned in appellants' opposing affidavits (TR 21, par. 18), as indicating from the standpoint of the mortgagee that any improvements "which enhanced the value of the mortgage security were acceptable without giving consideration to the reasonableness of the costs or the necessity therefor."

9. Assumption of corporate functions.

The net effect of the actions of Cash Cole and Everett Nowell had been the management and operation of Fairview Manor as individuals, and the assumption of all of the corporate functions of appellee corporation as individuals, ignoring the requirements and conditions provided in the articles of incorporation, by-laws and the General Laws of the Territory of Alaska, and ignoring the rights, privileges and interests of the Mortensen group and Cliff Mortensen in his capacity as director and officer. Their actions have been unauthorized in most instances, except where self-serving minutes of Board of Directors' meetings have been prepared by them, such meetings having been called without notice to the Mortensen interests or Cliff Mortensen. (Complaint, TR 6, par. IX, X; TR 280, par. 7(f), (g), (j); TR 304, par. 1, 3; TR 314, 317, par. 2, 4, 5, 6, 7.)

10. Unauthorized salaries and expenses.

There had been no authority granted for salaries in the sum of \$1,000.00 per month paid to each Cole

and Nowell, and for large personal expenses charged by them to appellee corporation. (Complaint, TR 6, par. IX; TR 280, par. 7(b), (c), (d), (f); TR 304, par. 5; TR 317, par. 2, 4, 13.) Nowell was employed by the Alaska Freight Lines in a semi-executive capacity and devoted a large portion of his time in that employment. He maintained a residence at Seattle, Washington, and spent a large portion of time there on matters wholly unrelated to the affairs of appellee corporation. Cole on several occasions since inception of the project had spent several months at a time sojourning in California and Seattle. Cliff Mortensen, on the other hand, had never drawn any salary as an officer of said corporation, but had spent large amounts of his time in connection with its affairs. (TR 304, par. 6; TR 317, par. 12.) The absences of Cole from the project had required the services of a temporary manager and payment of salary to the latter. (TR 336-337.) Mr. Campbell, the agent for the first mortgage holders, had noted the payment of \$200.00 per month to Cole's wife for the apparent purpose of showing apartments, the large number of long-distance telephone calls while Cole and Nowell were "outside", and the furnishings for their apartments charged to appellee corporation. (TR 336-344.) Cole and Nowell justify the salaries as officers and directors of the corporation, by action of the Board of Directors on August 3, 1951 (TR 21, par. 14), which meeting appellees have denied as being properly called, or ever receiving notice thereof, or attending the same. (Tr. 304, par. 2.) Appellants denied charging any personal expenses except for traveling expenses and

their own actual expenses while transacting business for the corporation "outside". On May 24, 1951, however, Nowell wrote a letter to Cliff Mortensen pointing out that Cole "will run the place to suit himself and has control of all the funds and can pay himself an exorbitant salary and expenses and the rest of us will be on the outside." (TR 314.)

11. Unauthorized apartments.

Cole and Nowell had taken three apartments in the project without authority and without payment of any rent since the inception of the project. (Complaint, TR 6, par. IX; TR 280, par. 7(c), (f); TR 304, par. 6, 7; TR 317, par. 2, 12, 14; TR 314, 505-506.) Cole and Nowell justified the taking of such apartments as necessary for proper management of the project. (TR 21, par. 15.) See par. 10, *supra*, concerning extended periods of absence by Nowell and Cole from the project.

12. Corporate records—minutes.

Proper corporate records and minutes of directors' meetings were not kept by appellants. (TR 280, par. 7(i); TR 317, par. 15.) References in opposing affidavits of appellants to purported minutes give no proof of notice or proof of such minutes. (TR 21, par. 10, 15.) Minutes which had been kept by appellants were largely of unauthorized meetings and are "self-serving minutes". (TR 304, par. 1, 7.) No accountant's report had been made available since Lofquist was discharged without authority. (TR 304, par. 4; TR 317, par. 15; TR 21, par. 13.) Mr. Campbell notes

that stock records were not available for his examination. (TR 334.)

13. Lack of accounting.

Pritchard & Lofquist, certified public accountants, approved by the directors, were discharged by Cole and Nowell on January 1, 1954, without authority and following the filing of this suit. (TR 304, par. 4; TR 21, par. 13.) There had been no proper accounting since that time or financial reports to the stockholders. Similarly proper corporate reports were not available to the stockholders since the inception of appellee corporation. (Complaint, TR 6, par. IX; TR 280, par. 7(c); TR 314; TR 317, par. 15.) Appellees state that the accountants were discharged to effect economies.

14. Articles of incorporation.

The provisions of the articles of incorporation had not been observed by appellants, and had been violated with respect to the holding of annual meetings of stockholders, control and management of corporate affairs, and in other respects. (Complaint, TR 8, par. X; TR 280, par. 8; TR 317, par. 5.)

15. By-laws.

The provisions of the corporate by-laws had not been observed by appellants, and had been violated with respect to the holding of stockholders' meetings, directors' meetings, transmitting of notices, annual election of directors, election of officers, determination of corporate policies, management and control of cor-

porate affairs, and in many other respects. (Complaint, TR 8, par. X; TR 280, par. 7(h), 8; TR 317, par. 5.)

16. Bayview Realty, Inc.

Cash Cole and Everett Nowell were the officers, directors and stockholders of Bayview Realty, Inc. The latter was to be the owner of 50 per cent of the common stock of appellee corporation. It was entirely controlled by Cole and Nowell. (TR 280, par. 6; TR 21, par. 8.) At the inception of the corporation about June 15, 1950, it was contemplated that the management of the project would be placed in Bayview Realty, Inc. (TR 21, par. 9.) Appellants set out in their opposing affidavits that this was accomplished at a purported meeting of Board of Directors on August 3, 1951, and that an agreement dated December 1, 1951, was executed by appellee corporation and Bayview Realty, Inc. (TR 21, par. 10; TR 290, 295.) Appellees denied receiving notice of such purported directors' meetings or having attended the same, or that the Board of Directors ever authorized said agreement of December 1, 1951, or that the individual appellees in their individual capacities or as stockholders or as directors ever agreed to the payment of any specific sum to said Bayview Realty, Inc., or Cole or Nowell. (TR 304, par. 2.) Examination of the agreement referred to in Cole's affidavit (TR 295—see original) shows the lack of the signature of Cliff Mortensen as the vice-president provided therein. A bond in the sum of \$10,000.00 was issued by United Pacific Insurance Company for a term of three

years from October 3, 1951, covering Bayview Realty, Inc. as management agent for appellee corporation. An application for the bond was not completed by Bayview or Cole, although repeated requests for it were made. The cost of the premium was billed on December 20, 1951, to Fairview Development, Inc. Since the application was not completed and a financial statement was not furnished by appellants, the bond was cancelled on April 25, 1953. (TR 317, par. 11; TR 304, par. 10.)

17. Damages.

(a) General.

The actions of appellants had operated to the detriment of Fairview Development, Inc., and the individual appellees as stockholders. Unauthorized salaries had been taken by Cole and Nowell, and personal expenses charged to appellee corporation including numerous long-distance telephone calls, personal furnishings for apartments, including a bar, traveling expenses and other undisclosed expenses. Apartments had been occupied without payment of rent. Extraordinary and capital expenditures in a "staggering" amount had been expended without authority and without provision or determination of how these large amounts would be paid. The mortgage security had been jeopardized. (Complaint, TR 11, par. XV; TR 208, par. 8, 9, 11; TR 329, 317, par. 2, 4, 6.)

(b) Equal protection.

The individual appellees stockholders did not enjoy the equal protection that was granted to them by

the articles of incorporation, the by-laws and the General Laws of the Territory of Alaska, due to the actions of Cole and Nowell, and therefore their rights, privileges and investment were impaired. (TR 317, par. 6, 17.)

(c) Adverse interest of appellants.

It appeared that Cole and Nowell had attempted to create an adverse interest in themselves for the purpose of gaining control and ownership of appellee corporation, and its assets, and to oust the individual appellees as stockholders. They had treated the project from inception as their own and to be handled for their own individual benefit. This had further impaired the credit, security and the assets of the corporation and the investment of the individual stockholders. (TR 304, par. 1, 11; TR 314, 317, par. 4, 5, 8, 9(a).)

(d) Violation of health regulations.

Cash Cole had violated the health regulations of the Territorial Health Department by refusing to chlorinate the water at the Fairview Manor and by drilling a new well without approval of the Department and at a site which the latter had indicated would not be approved. (TR 317, par. 7.)

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CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

On Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Division.

REPLY BRIEF OF APPELLANTS.

WARREN A. TAYLOR,

Fairbanks, Alaska,

WILLIAM H. SANDERS,

BAILEY E. BELL,

JAMES K. TALLMAN,

Central Building, Anchorage, Alaska,

Attorneys for Appellants. PAUL P. O'BRIEN, CLERK

FILED

AUG 17 1955

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REPLY BRIEF OF APPELLANTS.

REPLY STATEMENT OF CASE.

The statement of appellees, in their brief, is so misleading and confusing, that we deem it necessary to clarify many misleading statements. The following points out some of the major discrepancies, and page references are to appellees' brief.

Under Section A (1) pp. 9-10, appellees' brief, they attempt to support their statement that, negotiations to compromise the conflicting claims of the parties, as well as the claim of A. G. Rushlight, were undertaken at the suggestion of Nicolas Jaureguy, by citation to the transcript. However, it should be observed that the citations are almost all to affidavits of

parties adverse to appellant, or are distortions resulting from the lifting from the context of appellant's affidavits. It is true that the affidavits are part of the record, but the citation to such is misleading, and results in a defect that goes to the very heart of this case, namely, that *appellant is entitled to be heard in court on the issues involved here*. The affidavits are uncross-examined statements, and, as evidence, also violate the right of confrontation. Although sworn, appellant submits, that such statements are not sufficient evidence, upon which, a court should make a finding of fact.

On p. 9, appellees state: "Cash Cole himself indicated that he desired a settlement." (TR 154, 163, 167-168.) The reference to TR 154, apparently was referring to Cash Cole's statement, "and if there was a chance to settle, it should be attempted." This is a definite distortion of fact on the part of appellees, since the transcript clearly shows that the clause refers to a settlement of a \$690,000.00 suit by Nowell against Mortensen, and in no way supported the above quotation from appellees' brief. (See transcript 154.)

The important thing to show in this particular section is that all of the appellees' alleged factual statements in this section are supported by material that, alone, is generally inadmissible as evidence.

Under Section A (2) pp. 10-11, the appellees' statement of the case is subject to the same vice as stated above, that is, that all citations to the transcript refer to affidavits with one exception in the reference

to the findings of fact by the court. It is difficult to see how such citations can be used in determining the facts in this case, as a matter of law, since they are to material that is uncross-examined, as indicated above.

Section A (3) pp. 11-13, by inference, indicates that Cash Cole was capable of transacting business shortly after his heart attack, and is misleading in that it indicates that the heart attack of appellant was "purported". The evidence was uncontroverted that appellant suffered a heart attack and not a "purported heart attack". This conclusively shows the prejudice of the trial judge. (TR 64, 94.) This particular section, too, refers to the transcript which, except for the findings of fact, consists of references to affidavits only.

Section A (4) pp. 13-14, infers inconsistencies on the appellant's part concerning the understanding of settlement by appellant's family, and refers to two affidavits of appellant. However, the first (TR 60) was executed on January 7, 1954, and the second was executed on February 26, 1954, approximately seven weeks later. (TR 156.) The only inconsistency shown by appellees is their failure to point out the time lapse between the execution dates of the affidavits referred to. They could not, of course, be expected to point out that appellant's first affidavit was that of a very sick man, suffering from a heart attack. (TR. 65.)

The other allegations of this section are supported again by affidavits, largely appellees' own. As indi-

cated above, these are of questionable evidentiary value.

Under Section A (5) pp. 14-16, appellees state, "... the principal appellants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions". They refer to appellant's affidavits, with one citation to TR 148, concerning the profits from contracts and from the \$1,000,000.00 resulting from failure to do the work. It is conceded by appellant that the \$1,000,000.00 figure is a round figure, and represents an unliquidated amount. However, the profits from the contract do not represent an unliquidated figure. Appellees received \$3,080,000.00 for the construction of Fairview Manor. They have not denied receiving such payment. They have received this \$3,080,000.00, *representing payment in full for the construction*, and they are now trying to deprive appellant of his interest in Fairview Manor (TR 23). They have, by the judgment appealed from, taken the property and are now holding it against the appellant, even though they were paid far in excess of the amount due under the contract.

Under Section A (6) p. 17, appellees state that appellant had antagonized tenants and had been arbitrary toward them, causing vacancies. This statement is supported by reference to TR 88, which is a part of an affidavit of Frank V. Henderson. No other evidence is offered, nor in the record, to support appellees' stand. *They are submitting as a fact in this case the uncorroborated, out of court, uncross-examined statement of one of the principal parties adverse to appellant.*

Section A (7), p. 18, is entitled "No Impossibility of Performing Settlement Agreement", and infers that fifty-five or more vacancies since November, 1953, was the only reason for the statement in the motion to vacate the judgment that the agreement was impossible to fulfill, and so was confiscatory or in the nature of a forfeiture of appellant's interests. This statement neglects to point out that appellant's motion alleges fraud, misrepresentation, lack of consideration, mistake, inadvertence, surprise, excusable neglect, and an overreaching of appellant. (TR 52-55.) Although these allegations may not directly constitute impossibility of performance, they very well could result in a confiscation and a forfeiture. In any event, appellees' statement is specious, since appellant's position is virtually based upon the fraud and overreaching perpetrated upon him while he was ill, and upon the adjudication reached upon the fraudulently obtained stipulation. (TR. 52-55.)

Section A (8) pp. 18-19 suggests a ratification and acceptance of terms and conditions of settlement agreement. However, again, appellees neglect to point out, there was a final decree and order, dated the 10th day of October, 1953, in this case. (TR 45, 46.) The inferred ratification thus consists of nothing more than appellant's failure to violate the decree and order of the District Court. In any event, any suggestion of ratification, even through passive acceptance of the Court's order, should have been dispelled by appellant's motion to set aside and vacate the stipulation and judgment based thereon, and ap-

pellant's amended answer, both filed on January 8, 1954. (TR 47-56.)

Section A (9) entitled "Mechanics Liens" suggests that appellant sought benefits without performing himself. The appellees state, "... the stipulation filed in the case provided for assumption by the Mortensens and Henderson of said liens". (p. 20.) However, appellees fail to indicate that the Mortensens and Henderson were already liable for said liens since they had accepted the contract for building Fairview Manor and had accepted full payment therefor, even including the ten per cent (10%) held in escrow to guarantee the payment of subcontractors liens. (TR 144, 151.) When the appellees settled these liens, they were merely settling something that they were already bound to do. (TR. 386-398.)

Section A (10), p. 21, refers to litigation pending and infers the settlement thereof as performance by the Mortensens and Henderson. It should be pointed out that the litigation was that of the appellees primarily, so any settlement benefitted appellees. All of this litigation resulted from the appellees' contract to build Fairview Manor, for which they have received \$3,080,000.00, the full contract price. (TR 147.) One of the suits was against appellees in the amount of \$699,912.27, for failure to complete the contract for which they have been paid. Appellees' inference that the dismissal of a suit in this amount, *against them*, as being of value to the appellant is contrary to common sense and reason.

Another matter is also relevant to the litigation here. The appellees, by making and filing false and fraudulent affidavits stating that the job was completed, when they well knew it was not, drew the sum of \$311,687.68 from the National Bank of Commerce in Seattle. (TR 144, 202, 216.) If this money had not been taken by them, the subcontractor's claims could have been paid. The litigation was the result of their own wrongdoing. (TR 144, 151.) Appellant admits that the references here are to his own affidavit, but submits again that all of the fraud and chicanery involved in this case should be brought out into the light in open court.

Section A (11), p. 22, has apparently been thrown in by appellees for the sole purpose of confusing this court. The appellees well know that an order denying defendant's motion to vacate final judgment, appointing receiver, and directing delivery of Certificates of Stock (TR 252-258) was entered and filed on May 7, 1954, that deprived appellant of all control and interest in Fairview Manor. Why appellees insisted on rehashing the terms of a fraudulently obtained stipulation, which has become merged in the decrees and orders of the lower court (TR 45, 252) is incomprehensible. It is interesting to note that the appellees are not alleging that appellant is violating the decrees and orders, and they ignore the present status of Stock Certificates, control and operation of Fairview Manor. This especially since Judge Pratt, by his judgment, put the appellees into the

possession and complete control of the property, even though there is no denial of the fact that they were paid in full the entire contract price, and by equity and good conscience, should have no interest in the property.

Under Section A (12), p. 23, appellees allege performance on their part of certain terms and conditions of the settlement agreement. They neglect to show, however, that the alleged performance was for the settlement of claims resulting from their own wrongdoing. (TR 288-289.) The appellees were the contractors for the construction of Fairview Manor (TR 386-398), and although they have been paid the full amount of the contract, \$3,080,000.00, they had not paid off the subcontractors. They allowed the liens to be placed against the property (TR 288-289), and they are alleging performance of something that they were already bound to do. (TR 387.)

Under Section A (13), pp. 23-24, appellees state that Nowell had apparently performed the terms and conditions of a separate agreement. They also state that this presented no issue in this case. However, if Nowell was a party to the conspiracy as appellant maintains, his activities are definitely in issue in this case. (TR 59.)

Section A (14), p. 24, is entitled "Defaults by Appellants". A more appropriate heading would be "Additional Proof of Fraud in Obtaining Stipulation". Here appellees allege the failure to deposit the nine hundred shares of capital stock of Fairview Development, Inc. They allege the failure to pay

\$6800.00 at the time of the execution of settlement agreement; they allege the failure to pay the \$3200.00 on or before December 31, 1953; and they allege the refusal to permit Fairview Development, Inc., to pay the \$89,000.00; but they fail to state that the so-called default was of an agreement and stipulation taken from a man, sixty-four years of age, who at the time the stipulation was signed, was suffering from a heart attack and was under the effect of drugs (TR 64-65, 94), and this stipulation and the judgment based thereon is the very judgment the appellant is trying to set aside for fraud, misrepresentation, lack of consideration, mistake, inadvertence, surprise, excusable neglect and overreaching, which is clearly shown here.

Another inconsistency exists here with appellees' Section A (8), p. 18. There they infer a ratification of the agreement, but in this section they allege non-performance by appellant. Thus, appellees infer, appellant both ratified and defaulted, apparently at the same time. In at least one instance, the alleged default occurred first. That concerns the payment of \$6800.00 (TR 39) to be paid at the time of execution of the agreement. It seems extremely unreasonable to believe that appellant could default in the first payment of the agreement and then ratify it later. Actually, the appellant never accepted, or ratified, the agreement after recovering from his heart attack and the effect of the drugs. (TR 78, 141.)

Section A (15) pp. 25-26 concerns income. The statements there appear of little importance in mak-

ing a determination of facts in the case. However, there is one aspect of this situation that directly affects the whole case. This is an income received by Fairview Development Incorporated from rentals before the due date of the first payment of the mortgagee. \$142,228.15 was paid out by Fairview Development Incorporated for construction work, *which should have been done by the contractor*, and the appellees were the contractors, and this work was covered by the contract, and appellees had failed to fulfill their contract. (TR 387, 214-215.) The appellees have succeeded in bleeding the development corporation of \$3,080,000.00, and thus forcing appellant to spend the money in order to keep Fairview Manor operating. (TR 214-215.) There are also other claims, in excess of \$1,000,000.00 for work that was not finished by appellees in accordance with the plans and specifications (TR 202) but the \$142,228.15 is a definite, liquidated, indisputable sum, directly benefitting the appellees by doing work, finishing the contract that they had been paid to do.

Section A (16) is of no informative value. Nowell is now an adverse party to the appellant. (TR 99, 212.)

Section A (17) p. 27 states, with respect to the Rushlight transaction, “. . . this agreement and note between Rushlight and Cash Cole were not involved in these proceedings nor under the settlement agreement and stipulation made herein.” This is clearly false. The whole scheme was consummated by Rushlight the night he approached appellant, while appel-

lant was in his sick bed, and acquired his signature by false representation. (TR 57-58.) The execution of the stipulation and agreement on this particular occasion has not been denied. It was, therefore, one transaction. Obviously, appellees will resort to outright misrepresentation in order to prevent the facts of this case from being aired in open court.

Section A (18), p. 28 states, “. . . all of these claims and counterclaims were the subject involved in this case and were mutually released to the parties hereto.” Appellants will agree that appellee tried to avoid the claims through the stipulations and agreements. However, if the stipulations and agreements were fraudulently obtained, then these claims are not settled. It is interesting to note that they didn't deny the claims in this section, particularly the \$142,228.15, but alleged the settlement of them through the stipulation. These are all matters which should be brought out in open court.

The appellees in this section (p. 28) deny the misappropriation of funds in construction of Fairview Manor. However, under Article 8 (TR 205) of the building contract (TR 393-394) the appellees waive their liens against the property. Yet they permitted liens to be filed which were not paid off until after obtaining the stipulation from appellant. (TR 85.) Thus appellees misappropriated the funds paid them, namely the \$3,080,000.00, since they accepted payment without completing the contract. Another serious misappropriation occurred when Mortensen acquired the \$311,687.68, by virtue of a false affidavit,

which stated that there were no liens against the property. (TR 205-206.) This was signed by Mortensen *as President*, where he was in fact Vice-President, which fact was well known to him when he signed said affidavit. The money was released by the bank and F.H.A. waived all requirements of documents required by the contract, Article 12 (TR 396-397.) The violations of the contract, with respect to such dealings lead to the conclusion that questionable transactions were involved, so these are matters that should be heard in open court.

Section A (19), p. 29, is a true statement, as far as it goes. However, they fail to state that the final order in this case deprived appellant of his stock and all right, title and interest in and to Fairview Manor, Inc., ousted him from possession thereof, and placed the appellees in possession. (TR 257-258.) *All this was done without a trial on the merits.*

In Section A (20), p. 29, appellees state that the purpose of this suit was to resolve the deadlock in the conduct and affairs of the corporation (p. 28). This is not a true statement. The true purpose of the suit was to deprive appellant of his property in Fairview Manor, put him out and take possession thereof, which purpose was accomplished. (TR 258.) *It is indeed amazing that appellant could be so deprived of his property without the benefit of a trial.* Appellant cannot impress too highly upon this Court, the manner in which this was done, namely through the use of affidavits and other evidence which was uncross-examined material.

The other allegations in this statement are nothing more than allegations. They are charges that have never been proved by anything more than the affidavits of appellees. Appellant has never been given a chance to refute these charges by a trial of the issues in this case. The lower court did make some adverse findings of fact (TR 247), *even though the issues were never tried*, which, in our humble opinion, shows the bias and prejudice feelings of the trial judge.

Section A (21), p. 31, is false and misleading in the following respects: Appellees state that the sole investment of Nowell and Cole was securing a lease for seventy-five years on the land from the City of Fairbanks, and a temporary commitment. Appellant put in fifteen months' work and \$10,000.00 in promoting this development. (TR 199.) The statement is clearly false and misleading.

This particular section also states, "... and a temporary commitment, apparently for an F.H.A. mortgage." Appellees use the term of "apparently" only to mislead, since they know that an F.H.A. commitment was given. That was the basis of the whole project, and the appellees took advantage thereof.

Under Section B, pp. 31-33, appellees allege controversies existing at the time of filing suit, trial, and settlement. However, the only controversy existing now is whether appellant is to be deprived of his property without a trial on the merits. Appellees refer to a trial (p. 33), but it was merely the start of a trial. *Appellant has never been allowed to bring*

evidence into open court on the issues involved. The final order was issued by the lower court over appellant's objections and without his being heard on the issues here. The act of the lower court, in effect, was to penalize appellant for his unfortunate physical condition, which resulted in a heart attack. Appellant has filed a cross-complaint (TR 103-132), dated February 22, 1954, which brings out the true issues and controversies of this case. The lower court has refused to hear it. (TR 250.) We do sincerely hope this court will read this cross-complaint in connection with the reading of this brief.

SUPPLEMENTARY STATEMENT.

The following statement is clearly supported by the transcript, the statements of fact set out in this brief, the appellant's first brief, and the brief of appellees.

It should be borne in mind that the contractors, who are the appellees in this case, left and moved away from the buildings in December, 1951, although the buildings were not completed, all of which was well known to the contractors, and during the winter of 1951-52, to perpetuate the project and keep it operating the corporation had to pay from the rents and profits from said building, more than \$141,000.00. (See TR 214, Ex. A, TR 105, TR 128, TR 301-304.)

Thus the management of the building was forced to expend great sums of money that rightfully belonged to the corporation's surplus bank account to

do work that the contractors failed to do, by failing to finish the buildings. The buildings had to be finished to the extent of over \$141,000.00, so they could be kept rented and earning an income. Therefore, the appellees received the benefit of more than \$141,000.00 that winter by the corporation expending that amount of money to do the work of the contractors, who are appellees here. (TR 271, Paragraphs 3 and 4, TR 272, Section "C," Paragraph 7, TR 583, last paragraph, TR 584, also TR 145, 147 and 148.)

When all of this money was spent to do the contractors' unfinished work, then the contractors moved in to deprive the appellant of all of his interest in this property, which by the orders of the trial court, was accomplished. (TR 145, TR 1, paragraph 148.) When it became necessary for the transfer of the mortgage to the long-time investor, it was necessary to show that all bills were paid, and that there were no liens against the property. At that time the records showed there were \$470,000.00 in liens against the property, and that the property had not been completed according to plans and specifications. No acceptance by the Federal Housing Director, and none by the regular constituted authorities of the Fairview Development, Inc. No resolution from the Board of Directors accepting the project, but, on the contrary, objections were filed, refusing to accept the building as completed. (TR 150-151.)

There was supposed to be up in escrow in the bank, \$311,687.68, to be held there until the final payment of all lienable items had been made. The strange

thing about this is that the records in the bank show that a cashier's check was released May 1, 1952, for \$311,687.68, to Fairview Development, Inc., and cashed by the unauthorized signature of Cliff Mortensen. Also, the sum of \$10,125.49 was released May 7, 1952. (TR 216, EX. "B".)

There can surely be no doubt that these funds were released to the Mortensens as stated in Lofquist's letter (TR 216, Ex. "B"), yet, on the *12th day of August, 1953*, over a year later, Frank V. Henderson made an affidavit that the liens were protected by a cash escrow deposit (TR 328) but, according to the certified accountant's statement, these sums of money showed up as a credit in Mortensen's books, as having been received by them April 29, 1952, and May 7, 1952. (TR 216, Ex. "B".)

On August 10, 1953, Cliff Mortensen made an affidavit which conflicts with the above record. (TR 313, Paragraph 11.) The liens were not paid until some time after October 9, 1953. (TR 84-85, Paragraph 22.) Someone must have falsified considerably.

The apparent deadlock referred to in appellees' brief was brought about by the acts of Cliff Mortensen in attempting to take all of the interest of Cole and Nowell, and to deprive them of any authority in the operation of the project, and stop the Board of Directors from being able to transact any business. (TR 164, Ex. "A".)

On June 15, 1950, a contract was entered into between Bayview Realty, Inc., Cash Cole, and Everett

Nowell, as parties of the first part, and Nelse Mortensen, Frank Henderson, and Cliff Mortensen, as parties of the second part, wherein it was agreed that, upon completion of the housing project, Bayview Realty, Inc., should have the management and operation of the housing project in behalf of Fairview Development, Inc. (TR 24, Paragraphs 9 and 10.)

Then Mortensen attempted to ignore this contract (TR 24, Paragraph 10), and has breached the terms thereof.

CHRONOLOGICAL SCHEDULE.

For the convenience of the Court and in order to apprise this Court more fully of the various pleadings and transactions which have taken place in this case, we have set forth below all material in the record in a chronological order. The dates are those of execution, where applicable.

We feel that this schedule will give the Court a clearer concept of each transaction with respect to the others, at least as to the time. Although this information is in the record, it is our belief that the setting forth in chronological order will assist in getting at the facts of the case.

It should also be pointed out that this schedule could not have been put in appellant's brief, since the supplemental transcript was not available to appellant at the time of writing appellant's brief.

Date	Instrument	Page of TR	Executed By
July 10, 1950	Construction Contract	386	Appellees and App
October 31, 1952	Complaint	3	Walter Sczudlo
November 12, 1952	Appearance	277	Hellenthal and Mor
December 17, 1952	Answer	15	Morrissey, Hedrick, Roberts and Dun
June 22, 1953	Affidavit	280	Cliff Mortensen
June 25, 1953	Motion for appointment of Receiver	278	Walter Sczudlo
July 23, 1953	Complaint	375	John E. Hedrick
August 3, 1953	Affidavit	21	Cash Cole
August 3, 1953	Affidavit	288	Everett Nowell
August 7, 1953	Affidavit	295	Cash Cole
August 7, 1953	Affidavit	290	Cash Cole
August 7, 1953	Affidavit	300	Cash Cole
August 10, 1953	Affidavit	360	J. E. Swanson
August 10, 1953	Affidavit	304	Cliff Mortensen
August 11, 1953	Affidavit	329	J. F. Campbell
August 11, 1953	Affidavit	314	Cliff Mortensen
August 12, 1953	Affidavit	317	Frank Henderson
October 5, 1953	Transcript	462	Cash Cole
October 8, 1953	Transcript	549 and 564	Mrs. A. Scott
October 8, 1953	Order appointing Receiver	368	Appellees and App
October 10, 1953	Final Decree and Order	45	District Judge
October 28, 1953	Stipulation and Order of Dismissal	399	Joe Diamond, Joh rick and Judge
December 15, 1953	Notice of withdrawal of Attorneys	371	Nicholas Jaureguy
January 7, 1954	Affidavit	56	Cash Cole
January 7, 1954	Affidavit	61	Tom Cole
January 7, 1954	Affidavit	64	Joseph Ribar, M.
January 8, 1954	Amended answer	47	Warren Taylor (Cash Cole)
January 8, 1954	Motion to Vacate	52	Warren Taylor
February 9, 1954	Notice of Default and Demand	371	Nelse Mortensen, Cliff Mortensen Frank Henders
February 10, 1954	Affidavit	92	Josef Diamond an Earle Zinn
February 10, 1954	Affidavit	86	Frank Henderson

Date	Instrument	Page of TR	Executed By
ary 10, 1954	Affidavit	66	Cliff Mortensen
ary 10, 1954	Affidavit	94	Joseph Ribar, M. D.
ary 11, 1954	Affidavit	95	Everett Nowell
ary 12, 1954	Motion for Receiver	101	Walter Sezudlo
ary 12, 1954	Motion to Show Cause	373	Walter Sezudlo
ary 20, 1954	Affidavit	166	W. A. Rushlight
ary 22, 1954	Cross Complaint	103	Bell, Sanders, Taylor (Cash Cole)
ary 26, 1954	Affidavit	143	Cash Cole
ary 26, 1954	Affidavit	156	Cash Cole
ary 26, 1954	Affidavit	140	Ruth Cole
ary 26, 1954	Affidavit	132	Tom Cole
ary 26, 1954	Affidavit	171	Allene Hendricks
3, 1954	Affidavit	172	Everett Nowell
5, 1954	Affidavit	177	Cliff Mortensen and Frank Henderson
16, 1954	Affidavit	187	Everett Nowell
19, 1954	Affidavit	190	Cliff Mortensen
19, 1954	Amended Motion for Ap- pointment of Receiver	183	Walter Sezudlo
2, 1954	Affidavit	195	Cash Cole
1954	Findings of Fact and Conclusions of Law	228	District Judge
1954	Order Denying Motion to Vacate, etc.	252	District Judge
1954	Notice of Appeal	264	Warren Taylor
, 1954	Order	261	District Judge
, 1954	Motion to Strike Notice of Appeal	401	Walter Sezudlo
, 1954	Receiver's Petition	402	Robert E. Sheldon
, 1954	Order on Petition	410	District Judge
1954	Notice of Hearing	261	Walter Sezudlo
1954	Order Setting Bond	264	District Judge
1954	Transcript	572	Court Reporter
1954	Motion to Strike Name	259	Warren Taylor
, 1954	Receiver's Monthly Report	412	Robert E. Sheldon
, 1954	Order	260	District Judge
, 1954	Statement of Points	271	Warren Taylor

REPLY ARGUMENT.

Appellees' Brief, Section I, Sub-sections 1-6, can be treated under one heading in this reply. They all deal with the question of vacation of the decree in this case. *Assman v. Fleming*, 159 F. 2d 332, has been relied upon by the appellees to quite some extent. That case, however, involves the request for the vacation of a consent judgment, wherein oral testimony was allowed on the issues raised by the motion to vacate the judgment. (id. 335.) As indicated in appellees' brief, page 46, the findings of that court were sustained by substantial evidence, and could not be held to be an abuse of discretion. But that is not the case here. No oral evidence or testimony of any nature was given in this case on the question of vacating the judgment. The findings of fact and conclusions of law in this case were based solely on affidavits and other instruments in the record. In the *Assman* case, the court had a chance to see the witnesses, to hear them testify, to observe their demeanor under close observation, and even, if the court so desired, to question the witnesses himself. Here, the court had nothing but cold affidavits and other instruments upon which to base its findings and decree.

The order denying defendant's motion to vacate final judgment; appointing receiver; and directing delivery of Certificates of Stock, was, in effect, final. That order deprived appellant of all interest in Fairview Manor. (TR 257-258.) Unless that order is changed, appellant will be forever deprived of his

property. Perhaps the court has been misled because of the practice in the District Courts of Alaska. The courts here normally refuse to hear testimony in cases where interim relief is requested. The show cause orders and other interim relief requests are usually supported by affidavits. The theory, of course, is that the courts do not wish to "try each case three or four times". This practice does prevent the waste of the court's time, but such a practice should not be used in cases involving the final disposition of litigation. Where the relief desired is truly interim, the parties thereto always have their day in court at the final trial. Here, the denial of the motion to vacate was final.

It is true that the burden of proof is on appellant, but appellant must have a chance in court to carry this burden of proof.

Under Sub-sections 5 and 6, appellees have indicated that there was not sufficient proof of fraud, conspiracy and other acts and of the mental incompetence of appellant. However, again, appellant must have his day in court with which to show such evidence. There can obviously be no evidence when none is allowed.

In Sub-section 5, appellees have referred to *Alaska Northern R. Co. v. Alaska Central Co.*, 5 Alaska 377; *American Finance & Commerce Co. v. Gordon*, 1 P. (2d) 886, 164 Wash. 45; *Cerkonek v. Dibble* (Wash.), 256 P. (2d) 488; *Bonzelman v. Northwest Poultry & Dairy Products Co.*, 225 P. (2d) 757; *Tecklenburg v. Washington Gas & Electric Company* (Wash. 1952),

241 P. (2d) 1172; *Travelers' Ins. Co. of Hartford, Conn., v. Byers* (Calif.), 11 P. (2d) 444, and *Handley v. Handley*, 243 P. (2d) 204. The first case, cited as 5 Alaska 377, cannot be found in the Reporter at page 377, nor for that matter, anywhere in Volume 5 of Alaska Reports. All the other cases cited involve the taking of testimony before the court. None of these were tried and determined on affidavits. In the case of *Handley v. Handley*, the court stated at p. 209, in reference to *Waller v. Julius*, 68 Kansas 314, 74 P. 157:

“That case reached this court by appeal from an order sustaining a demurrer to plaintiff’s petition, which, briefly stated, alleged that the deed was without consideration and the grantor at the time of making it was of unsound mind and incapable of transacting any business whatsoever and did not know what she was doing, which facts were known to the grantee. Other facts were alleged as to plaintiff’s interest in the property and her right to maintain the action. By reversing the trial court this court simply held that plaintiff was entitled to a trial upon her petition. Possibly a similar holding would have been made if a demurrer had been filed to the petition in this case. However, that was not done. An answer was filed *and plaintiff offered all his testimony. . . .*” (Emphasis supplied.)

The citations in this section of appellee’s brief, therefore, do not support appellees’ position and are not directly in point, as they have stated, since there was no testimony or evidence other than affidavits upon which the court could base its decision.

The appellees' subsection 6 is also subject to the same error. The cases cited there are also cases that involve a trial before the court. Appellees' subsection 6 is headed, "There is no clear, cogent and convincing proof, etc." This may or may not be true, but it should be determined by sworn, cross-examined, in-court testimony. In any event, the question of the mental competence of Cash Cole may not be determinative, since fraud and overreaching could be perpetrated upon an individual who need not necessarily be mentally incompetent.

Under Sub-section 7, the Appellees infer that the settlement agreement cannot be rescinded without restoring Appellees to status quo. However, this is not an absolute rule.

"Fraud or bad faith is material, to the extent that a contract or conveyance can be avoided on the ground of incompetency even in the absence of a surrender or offer to surrender the consideration received, in a case where the party against whom the avoidance is sought was guilty of fraud or undue influence, or secured the contract or conveyance with knowledge of the incompetency of the other party or of the grantor." (28 A.J. 726, Sec. 90.)

In this same section Appellees state:

"Restoration of status quo, or benefits is a prerequisite." This, too, is a general rule and there are many exceptions to it.

"The rule requiring restoration of the status quo upon rescission has been held not to be applicable in certain instances where there has been fraud

in the factum of the instrument sought to be avoided or where the defendant has obtained the plaintiff's property under the guise of a contract which is wholly wrongful." (24 A.J. 18, Sec. 197.)

This section of appellees' brief also, as indicated above, refers to cases, the issues of which were tried upon testimony and evidence before the court. That, again, distinguishes the cases cited from the case herein.

In the final analysis the arguments under appellee's sub-section 7 are moot. Appellant never received any benefits from the agreement. The alleged performance on the part of the appellees consisted of payments to third parties. (See appellant's Reply Brief, Statement of Facts, at Page 6.) Most important of all, however, is that the appellees were already bound to pay off the liens involved under the terms of the original construction contract. (TR 386-398.)

Appellees' Sub-section 8 argues that appellant affirmed or ratified the settlement agreement. Their argument essentially is that appellant's failure to give a written affirmance of the Stipulation and Decree within a period of three (3) months after the execution operates as a ratification. Under the facts of this case such an argument is without merit. The Motion to Vacate, filed January 8, 1954, slightly less than three (3) months after the filing of the final Decree and Order, was the written disaffirmance. However, appellant was suffering from a heart attack

during this period. His attorneys had ceased working on the case and withdrew during this period (TR 371), and appellant did nothing to indicate that he had ratified the Stipulation. The litigation in this case was started by appellees on October 31, 1952. (TR 3.) In such a long, drawn-out case, a period of less than three (3) months should not be considered an unreasonable time within which to file the written disaffirmance.

Appellees refer to 28 A.J. 709-710, Sec. 77, which states at page 710:

“As a general rule, one who seeks a rescission or cancellation of an instrument in equity will be required to give notice of disaffirmance before bringing suit only when such notice is necessary for the protection of one who has acted in good faith.”

Under such a rule, no disaffirmance would be necessary if the appellees were guilty of fraud and overreaching.

Appellees also support their position in this section with a reference to *E. J. Albrecht Company v. New Amsterdam Casualty Company*, 163 F. (2d) 16. The citation is not in point. The case referred to involves parties who continued to deal with each other even after the alleged claim arose, and, in addition, suit was not brought until two (2) years after the claimant had left the job. In the case herein the appellant not only had ceased dealing with the appellees, but had taken positive action to disaffirm within a period of less than three (3) months.

Appellees' argument under Section II is unsound. Here the appellees are claiming that the issues raised by appellant's Cross-Complaint were *res judicata*. It is difficult to see how these issues could be *res judicata* if the Motion to Vacate is granted. The issues would still be before the Court. In any event, the question of whether the issues in the Cross-Complaint were *res judicata* or not appear unimportant. This is not a trial of a case but an appeal.

Under Section III, the appellees state that the appointment of a Receiver for Fairview Manor is not a proper matter for review on this appeal. However, they did see fit to devote nine (9) pages in an attempt to controvert appellant's brief on this particular point. Most of the matters discussed by appellees are well covered in appellant's brief, but several new allegations should be answered. Appellees allege large expenditures and extravagance, III, Sec. 3 (a), personal gain and unnecessary salaries, III, 3 (c), conversion through salaries and expenses, III, 3 (d), and scheme of unfair operations III, 3 (g). There is no showing in the record that Cash Cole received any profits or earnings other than the \$1,000.00 per month that he was entitled to under the management contract with the appellees. (TR 298.) Cash Cole received \$1,000.00 per month for the management of a more than three million dollar project in an area where common laborers earned more than \$1,000.00 per month. It should also be borne in mind that during the period in which Cash Cole was man-

aging this property, the appellees succeeded in bleeding the development of \$142,228.15 indirectly and \$311,687.68, a sum left in escrow for the payment of lien claims. (See Statement of Case, *supra*.)

Appellees also infer, III, 3 (f), the lack of corporate audit or statement. This is baldly misleading. Fairview Manor was financed by a loan of more than three million dollars from Institutional Securities Corporation. The loan was guaranteed by FHA. Although it does not appear clearly in the record, it seems extremely doubtful that both FHA and the mortgagee, with an interest in this amount, would permit the management of the project to get by without a proper corporate audit or statement. To date neither Institutional Securities Corporation nor FHA have intervened in the litigation involved in this case.

Since the issues in this case were never tried, the lower court did not have sufficient information concerning the whole transaction to enable him to properly determine whether a Receiver should be appointed or not. The following indicates, to some extent, the lower Court's knowledge of the facts of this case:

"The Court. You may—just mind telling us just us what all matters should be secured by this supersedeas bond? What are the matters?" (TR 575-576.)

Mr. Sczudlo answered.

"The Court. How is that money taken care of?" (TR 576.)

Mr. Sczudlo answered.

“The Court. Is there any mortgage on the property?” (TR 577.)

Mr. Sczudlo answered.

“The Court. Who is the Mortgagee?” (TR 577.)

Mr. Sczudlo answered.

“The Court. Very well.” (TR 577.)

Mr. Sczudlo answered.

Later on in the Transcript, the following took place:

“The Court. Well, then, the matter will be decided for the present by an Order Denying the Motion?

Mr. Sczudlo. No, it will be decided by an Order Allowing the Motion, that is, to strike the Fairview Development Company from that Notice of Appeal.

The Court. Oh, it is to strike it from the Notice of Appeal?

Mr. Sczudlo. Yes, sir.

The Court. That is what your motion is for? All right, your motion is denied, then.

Mr. Sczudlo. The motion is denied sir, or granted?

The Court. It is granted.” (TR 583-584.)

Although the lower Court cannot be expected to remember everything, the Transcript of Proceedings of June 4, 1954, seems to indicate that the lower Court knew little or nothing of the facts of this case.

CONCLUSION.

In conclusion, we feel that the appellees have failed to refute the matters set forth in appellant's brief and respectfully submit that, in the interests of justice and equity, the decision of the lower Court should be reversed.

Dated, Anchorage, Alaska,
August 4, 1955.

WARREN A. TAYLOR,
WILLIAM H. SANDERS,
BAILEY E. BELL,
JAMES K. TALLMAN,
Attorneys for Appellants.

No. 14,424

IN THE

United States Court of Appeals
For the Ninth Circuit

CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

On Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Division.

APPELLANT'S PETITION FOR A REHEARING.

WARREN A. TAYLOR,

Fairbanks, Alaska,

BELL, SANDERS & TALLMAN,

Central Building, Anchorage, Alaska,

*Attorneys for Appellant
and Petitioner.*

FILED

OCT 27 1955

PAUL D. O'BRIEN, CLERK

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APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable William Healy, the Honorable
Walter L. Pope, and the Honorable James Alger
Fee, Circuit Judges:*

I.

PRELIMINARY STATEMENT.

On the 29th day of September, 1955, this Honorable Court affirmed the ruling of the Court below which denied a motion to set aside a compromise stipulation and to vacate judgment in the District Court for the District of Alaska, Fourth Division, and which rendered a judgment taking from the ap-

pellant one-half of the stock of the Fairview Development, Inc.

This Honorable Court held, in its opinion, that no abuse of discretion was discernible, nor error committed in the Court below.

II.

STATEMENT OF THE CASE.

This petition for rehearing seeks to have this Honorable Court reconsider its opinion on four points of law:

First. Are affidavits and oral evidence on one side only, a sufficient record on which to base a final determination, when said affidavits are controverted by many affidavits on the other side thereby creating a direct controversy, and the determination based upon such affidavits resisted?

Second. Is it not an abuse of discretion for the trial court to refuse to vacate a judgment which was not based upon trial in open court, when a trial on the merits is requested and evidence proffered?

Third. Is it not a deprivation of property without due process when a litigant is deprived of property by a judgment which is not based upon a trial of the merits of the case and which is objected to within a reasonable time?

Fourth. Is it not a deprivation of property to reach out and decide a matter not covered in the orig-

inal judgment and by said judgment take from the appellant his one-half of the stock in Fairview Development, Inc., without a trial and with the appellant being denied a hearing of any kind?

III.

SUMMARY OF ARGUMENT.

A. Affidavits and oral evidence on one side only are not a sufficient record upon which to base a final determination, when said affidavits are denied and the determination based upon such affidavits and one sided evidence resisted.

B. It is an abuse of discretion for the trial court to refuse to vacate a judgment which was not based upon trial in open court, when a trial on the merits is requested and evidence proffered.

C. It is a deprivation of property without due process when a litigant is deprived of property by a judgment which is not based upon the trial of the merits of the case and which is objected to within a reasonable time.

D. It is a deprivation of property without due process when the Court, long after final judgment in the case, and while hearing a motion to vacate the judgment, goes on beyond the original judgment and takes the one-half of the stock in Fairview Development Company which belongs to the appellant and without any testimony, and without any trial, de-

prives the appellant of his property without due process of law, and without even a resemblance of a trial in any way.

IV.

ARGUMENT.

A. The transcript in this case shows that there was no testimony given in open court to support appellant's case, but appellees had one hundred and ten pages of testimony taken in their behalf. (Tr. 462-571.) The only evidence for appellant that was before the lower court consisted of affidavits alone. This places the lower court in the incredible position of making a final determination in a case upon a record which consists of testimony introduced into open court for one side only, part of which was uncross-examined, and ex-parte affidavits, and by denying the appellant the right to a trial on the merits of the case.

This Honorable Court pointed out, on Page 2 of its Opinion, that the original suit presented a complicated factual situation. However, with all due respect to this Honorable Court, it seems impossible to determine the factual situation, complicated or otherwise, where one party litigant is not allowed to introduce evidence on the issues involved.

B. Because of the confused record and voluminous briefs, the undersigned humbly submits that an abuse of discretion by the lower court may have been overlooked by this Honorable Court.

At pages 247-248 of the transcript the lower court made some extremely damaging Findings of Fact against the appellant. These findings are based largely upon the proceedings at the trial, which consisted of testimony in the appellees' case in chief. This being *prior* to the stipulation and purported settlement; and *prior* to the judgment attempted to be vacated. No testimony was received on the hearing appealed from here.

C. "An opportunity for hearing is one of the essential elements of due process, at least whenever it is necessary for the protection of the parties. It was a maxim of the common law that 'no man should be punished without an opportunity of being heard.' Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest a claim set up against him, and be allowed to meet it on the law and facts and show if he can that it is unfounded. * * *" (12 Am. Jur. 301.)

The cases supporting this basic concept of law are too numerous to cite, but some of the later cases in support of this are: *Anderson National Bank v. Lockett*, 321 U. S. 233, 88 L. Ed. 692, 64 S. Ct. 599, 151 ALR 824; *Griffin v. Cook County*, 369 Ill. 380, 16 N. E. (2d) 906, 118 ALR 1157; *Carrig v. Anderson*, 167 Kan. 238, 205 P. (2d) 1004, 9 ALR (2d) 545.

"The right under the due process clause to full hearing includes the right on the part of the party whose rights are sought to be effected to introduce evidence and have judicial findings

based upon it. A party has the right to the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the Constitution, would be a protection to his property or his liberty." (12 Am. Jur. 313-314.)

This right to introduce evidence is also supported by much authority, of which some of the leading cases are as follows:

Baltimore and Ohio Railroad Co. v. United States, 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797;

Louisville and N. R. Co. v. Finn, 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146;

Washington ex rel. Oregon R. and Navigation Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535;

Wilkey v. State, 238 Ala. 595, 192 So. 588, 129 ALR 549;

State v. Sax, 231 Minn. 1, 42 N. W. (2d) 680, 18 ALR (2d) 929.

In the last cited case, one point held was:

"The exclusion of competent and relevant evidence on the ground that the trial court was in possession of the evidence, although it was not in the record, is not due process, * * *"

This case cited, among others, the *Chicago Junction* case, 264 U. S. 258, wherein Mr. Justice Brandeis stated at page 265,

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to

consider evidence introduced or to make any essential finding without supporting evidence is arbitrary action."

If the appellant herein was entitled to be heard in the lower court, he was entitled to introduce evidence and since his adversaries were heard, *and findings of fact made upon such evidence*, the lower court should have permitted him to be heard.

The appellant has been deprived of his property without due process by the refusal of the lower court to permit him to introduce evidence and have findings based upon it. It is admitted that under certain conditions the refusal to permit the introduction of evidence might not be a deprivation of property without due process, but it should be borne in mind, as indicated above, that the lower court made many findings of fact which are based upon the oral testimony taken in the appellees' case in chief. *The appellant was never allowed to refute this evidence by the introduction of his evidence in open court.*

D. We endeavored to make the issues clear in this appeal, but going through the maze of affidavits and many orders made, it is quite apparent that appellants were unable to adequately show to this Court, one of the real, absolute questions to be decided on this appeal. That is, when the appellant moved to set aside the judgment and stipulation of October 10, 1953, under Rule 60 of the Federal Rules of Civil Procedure, many affidavits and cross-affidavits were filed, and then in February of 1954, a motion was filed by the plaintiffs for the purpose of procuring an order of the Court making the appellant, Cash Cole, forfeit

his stock in the corporation in addition to all other things covered by the judgment. This was outside of the judgment that the appellants attempted to vacate, and then without any evidence to support this motion, the Court made an order, coupled with the order denying defendant's motion to vacate final judgment and one appointing a receiver and directing delivery of certificates of stock belonging to Cash Cole and his associate. This was never heard or tried in any way, and the trial judge, coupled with the final order denying the motion to vacate, the fourth paragraph of the order which directed the said Cash Cole and Bayview Realty, Inc., to assign and deliver their certificates evidencing the capital stock of the plaintiff corporation issued in their names ordering this stock issued and delivered to Nelse Mortensen, Cliff Mortensen and Frank V. Anderson. This the appellants were absolutely unable to impress upon this Honorable Court, because nowhere in the opinion, as rendered, was this matter mentioned in the slightest, although this order deprived these appellants of one-half of the stock in Fairview Development, Inc., and was then without even the slightest resemblance of a trial, and without any evidence to sustain it, and deprived these appellants of thousands of dollars in value, without any consideration whatsoever. (Tr. 255, Par. 4.) We also call your attention to the further orders immediately following this paragraph appointing a receiver and other orders. We still contend that this Court should pass on that question on this appeal as we conscientiously appeal to the sense of reason of this great Court, that this is wrong and should be corrected at least by setting aside this part of the judgment, in

that regard, even if it should sustain and affirm the action of the trial judge in denying the motion to vacate under Rule 60. We cannot understand how the trial judge could refuse to open the case at the request of the appellants, and then open it enough to render an affirmative judgment outside of the real issues in the case, taking property that belonged to the appellants (one-half of the stock of Fairview Development, Inc.), and give it to the plaintiffs.

We trust this Honorable Court will consider this matter in connection with the other portions of this Petition for Rehearing.

V.

CONCLUSION.

It is respectfully submitted that this Honorable Court, because of the confused record and difficult factual situation in this case, may have overlooked the points above which are considered vital by the undersigned, and that this petition for rehearing be granted.

Dated, Anchorage, Alaska,
October 26, 1955.

WARREN A. TAYLOR,
BELL, SANDERS & TALLMAN,
By BAILEY E. BELL,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I, BAILEY E. BELL, counsel for petitioner in the above-entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion, is well founded in law and in fact, and proper to be filed herein.

Dated, Anchorage, Alaska,
October 26, 1955.

BAILEY E. BELL,
*Attorney for Appellant
and Petitioner.*

No. 14,431

IN THE

**United States Court of Appeals
For the Ninth Circuit**

S. H. P. VEVELSTAD, WILLIAM L. PAPE, and
AURORA NICKEL COMPANY, a corporation,
Appellants,

VS.

E. MILES FLYNN,

Appellee.

BRIEF FOR APPELLANTS.

R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
P. O. Box 1211, Juneau, Alaska,
Attorneys for Appellants.

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No. 14,431

IN THE
United States Court of Appeals
For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE, and
AURORA NICKEL COMPANY, a corporation,
Appellants,

vs.

E. MILES FLYNN,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statutes.

This action was brought by Appellee to determine the alleged adverse claim of Appellants created by their mining claims as against Appellee's alleged mining claims on Yakobi Island, Alaska, which action was brought under Section 56-1-91, ACLA 1949, which reads:

“§ 56-1-91. Action to Determine adverse claim. Any person in possession, by himself or his tenant, of real property may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest.”

Section 56-1-91, ACLA 1949, Volume 3.

A final judgment was entered by the learned trial court on April 24, 1954 (P.R. 119-122), from which Appellants have appealed to this Honorable Court under Section 1291 of the new Federal Judicial Code, which reads:

“Section 1291. Final Decisions of District Courts. The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.”

Title 28 USCA Judiciary & Judicial Procedure, Sec. 1291.

The entire record shows the jurisdiction of both the trial and this Court; but reference is particularly made to Appellee's Complaint and its title (P.R. 3); Appellee's Amended Complaint (P.R. 53), particularly paragraphs 6 and 7 thereof (P.R. 60-61); and Appellee's Answer (P.R. 67 to 75.)

See Appendix for pertinent United States and Territorial Mining Laws; also Section 112, Circular 430, United States Department of Interior, relative to Canadians right to locate mining claims in Alaska.

B. Pleadings.

Trial, which commenced at 2 p.m., December 15, 1953 (P.R. 135), and continued for several days, was had upon Appellee's Amended Complaint and Appellants' Answer thereto, setting up Four Defenses with a Counterclaim denominated as such. No Reply was served or filed.

Appellee's Amended Complaint (P.R. 53-61), alleged that Appellee was the owner of and had located 102 lode mining claims on Yakobi Island, Alaska, during October and November, 1952 (P.R. 53); that Appellee made discoveries on those claims and recorded within 90 days after location certificates of location thereof with the Sitka Recorder, within whose precinct they were situated (P.R. 58-59); that Appellee was *in actual possession of the area embraced within the boundaries thereof as herein set forth* (P.R. 59); that Appellants claimed some right, title, or interest in and to the ground area embraced within those boundaries by virtue of the location of certain mining claims the exact location whereof Appellee was unable to fix by examination of ground markings or otherwise but that Appellants' claims were invalid (P.R. 60) and constituted a cloud upon Appellee's title to its alleged 102 mining claims (P.R. 60); that the value of Appellee's alleged mining claims was thereby adversely affected and it was necessary for a court of equity to determine Appellee's and Appellants' conflicting claims and rights (P.R. 60-61).

Appellee's Amended Complaint did not describe the individual boundaries of his 102 mining claims, nor did it incorporate in it by reference the descriptions of any of those claims as they appear on the records of the Sitka Recorder; but described his pretended 102 mining claims by perimeter only, and in three separate groups (PR 54-57); also, by a plat, marked Exhibit "A" (PR 58), which was not reproduced in the Printed Record as Appellants had anticipated it would be inasmuch as it was attached to and specifically incorporated into the allega-

tions of the Amended Complaint, which specifically alleged: "that the boundary lines of each of said claims is marked on said plat in accordance with the location of such lines on the ground" (PR 58), thereby making it a part of that pleading under Rule 10(c) FRCP.

Appellee's Complaint (PR 3-8), which was superseded by his Amended Complaint, neither described his pretended 102 mining claims either individually or by reference therein to the Sitka Recorder's records, nor did it do so by any attached plat, but it described them by perimeter only; however, in four groups instead of in three. Furthermore, the perimeters therein do not close and do not accord with those in Appellee's Amended Complaint.

Neither *Appellee's Amended Complaint* nor his *Complaint* defined the extent of the alleged conflict of Appellants' 27 lode claims with his pretended 102 mining claims, or with which of those 102 claims they conflicted, or named them or gave the number of them.

Appellants' Answer (PR 67-75) set up Four Defenses with a Counterclaim denominated as such (PR 73).

First Defense (PR 67): Appellee's pleading failed to state a claim against Appellants upon which relief could be granted.

Second Defense (PR 67-68): alleged that Appellee's 102 pretended mining claims constituted a cloud upon Appellants' title to their 27 mining claims (PR 68); denied (PR 67) all of Appellee's allegations by denial of Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Amended Complaint (PR 53-61); but admitted that Appellee in October and

November, 1952, made his 102 pretended mining claim locations and recorded pretended *location notices* thereof with the Sitka Recorder; that the situs of all of them was on Yakobi Island, Alaska, within the jurisdiction of the trial court, except portions of the pretended Pelican claims 27, 28, 29 and 30 were situated on the foreshore or in the deep and navigable waters of Lisianski Strait; that the outer boundaries of Appellee's 102 pretended mining claims are described in said Pleading, according to said plat, marked Exhibit "A" attached thereto (which as stated was not reproduced in the Printed Record), by group perimeters; that Appellants owned and held prior title and possession of such ground area, including the mineral rights, of their 27 mining claims as was embraced within the boundaries of his 102 pretended claims (PR 67-68).

Third Defense (PR 68-73), Par. 1: Alleged ownership and possession of Appellant Aurora Nickel Company, an Alaskan corporation, and prior location by Appellant Pape on October 1, 1950, of the unpatented lode mining claims Rita No. 1 through No. 4, Hope No. 1 through No. 12 and Svere, which on October 27, 1950, Pape conveyed to Appellant Corporation, and ownership and possession of Appellant Corporation, and its prior location on July 1, 1952, of the unpatented lode mining claims Doris No. 1 through No. 4, Takanis No. 1, Svere No. 2, and Beach No. 1 through No. 3, and ownership and possession of Appellant Corporation, and its prior location on June 8, 1953, of unpatented lode mining claim Svere No. 3 (PR 68-69); locations made on public lands; made discoveries of valuable minerals or adopted known pre-

vious discoveries (PR 69); plain signs or notices containing name of lode claim, name of locator, date of location, number of feet in length along vein each way from point of discovery, and width on the side of center of lode or vein, posted on each claim on date of respective location upon surface or adjacent to discovery point (PR 69); erected on each claim in center of each end line and at each corner or angle of the claim substantial monuments of stone or posts, not less than three feet in height nor less than three inches in diameter, hewn and marked with the name of claim, position or number of the monument and direction of boundary lines, and cut out, blazed, or marked the boundary lines so each claim could be readily traced (PR 69-70); within 90 days after respective locations Appellants recorded *certificates of location* with the Sitka Recorder, within whose precinct claims are located (PR 70); during the assessment years ending respectively noon July 1, 1952, and July 1, 1953, did more than \$100 worth of annual assessment work and labor upon and for the benefit of Svere, 12 Hope, and 4 Rita lode claims, and recorded on July 25, 1952, and July 6, 1953, with the Sitka Recorder Appellant Corporation's respective affidavits of doing that assessment work and labor during those two assessment years (PR 70); on June 22, 1953, Appellant Corporation made amended locations of the Svere, Svere No. 2, Doris No. 1 through No. 4, and Hope No. 1 through No. 12 lode mining claims (PR 70); made discoveries of valuable minerals or adopted previous known discoveries (PR 70); plain signs or notices containing name of claim and of locator, date of location, number of feet in length along vein each way from point of discovery, and width on the side of the

center of the lode or vein, posted on the date of location upon the surface or adjacent to the discovery point (PR 71); erected on each claim in center of each end line and at each corner or angle of claim substantial monuments of stone or posts, not less than 3 feet in height or less than 3 inches in diameter, hewn and marked with name of claim, position or number of the monument and direction of boundary lines, and cut out, blazed, or marked the boundary line so each claim could be readily traced (PR 71); within 90 days thereafter and on July 6, 1953, Appellants recorded *amended certificates of location* with the Sitka Recorder (PR 71).

Par. 2: Appellant Vevelstad is President and stockholder of and financially interested in financial success of Appellant Corporation (PR 71); Appellant Pape holds a contract with Appellant Corporation to receive one million tons, or the monetary proceeds derived therefrom, of such nickel and other ores as are mined from Appellant Corporation's 27 lode mining claims (PR 71).

Par. 3: Appellee's location of his pretended 102 lode mining claims, in so far as they embrace and cover the same ground area as embraced and covered by Appellants' 27 lode mining claims was made subsequent in time and after Appellants had located and taken possession of their 27 lode mining claims (PR 71-72); Appellee did not make a discovery of valuable minerals upon each or any of his pretended 102 lode mining claims (PR 72); or, if he did, Appellee did not post on the surface at or adjacent to the point of discovery a plain sign or notice containing the name of the lode claim, the name of the locator or locators, the date of the location, and the

number of feet in length claimed along the vein each way from the point of discovery, and the width on each side of the center of such lode or vein and did not erect on each or any of said claims on the vein at the center of each end line and at each angle or corner of the claim substantial monuments of stone or set posts, not less than three feet in height nor less than three inches in diameter hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines, and did not cut out, blaze or mark the boundary lines of each or any of said claims so that they could be readily traced and did not actually locate upon the ground said claims upon any vein or veins (PR 72); that neither the pretended boundaries nor the pretended courses of Appellee's 102 pretended lode mining claims as he pretended to locate and lay them out upon the ground accord with or conform to either the pretended location notices thereof which Appellee recorded with the Sitka Recorder or with the descriptions thereof as set out in his Amended Complaint, nor did Appellee file for record at the time of or within 90 days after making his pretended locations *certificates of location* of any of his pretended 102 lode mining claims (PR 72-73).

Par. 4: Appellants are now and at all times since their respective dates of locations have been entitled to the exclusive right of possession and enjoyment of all of their 27 lode mining claims (PR 73); Appellee's pretended locations and recording of pretended location notices of his pretended 102 lode mining claims constitute clouds upon Appellants' title to their 27 lode mining claims to the extent of the conflict in ground area between Appel-

lants' said claims and Appellee's pretended claims (PR 73).

Fourth Defense and Counterclaim (PR 73-74): As stated, Appellants *denominated* their Fourth Defense as a *Counterclaim* in accordance with Rule 7(a) FRCP.

Par. 1: Appellants realleged and by reference to their Third Defense incorporated all of it in their *Fourth Defense and Counterclaim* (PR 73).

Par. 2: Appellee, sometime in October and November, 1952, *then knowing* that Appellants were the owners and possessors of their 27 lode mining claims and were negotiating for the sale thereof and the extraction, mining, and sale of the valuable minerals therein, *wilfully and maliciously trespassed* thereupon by the pretended locations, the location notices whereof Appellee recorded with the Sitka Recorder, of Appellee's pretended 102 lode mining claims, and *blanketed the entire area* embraced within Appellants' 27 lode mining claims for the purpose of preventing Appellants not only from excavating and mining or arranging for the excavating and mining of the valuable minerals in Appellants' mining claims but also from selling them and the valuable mineral therein and for the further purpose of thereby enabling Appellee, on behalf of unknown persons represented by him, to prevent nickel in Alaska from reaching the market to compete with nickel mined in other parts of the world, particularly in Canada (PR 73-74).

Par. 3: Appellee by his said actions prevented Appellants from so excavating, mining and selling their 27 mining claims and the valuable minerals therein, and thereby damaged Appellants in actual loss of profits that

they would otherwise have made of not less than five million dollars and the further sum of fifteen million dollars by way of exemplary damages (PR 74).

Prayer: That Appellants' title to their 27 lode mining claims might be quieted and all claim of Appellee thereto dissolved and held to be invalid and for judgment against Appellee for five million dollars actual damages and for fifteen million dollars exemplary damages, and for Appellants' costs and disbursements, including a reasonable attorney fee (PR 74-75).

Reply: Appellee served and filed no Reply notwithstanding Appellants' Fourth Defense was denominated as a *Counterclaim* under Rule 7(a) FRCP, which pleaded special damages in accordance with Rule 9(g) FRCP, and constituted a *Compulsory Counterclaim* under Rule 13(a) FRCP, to which a Reply was required under Rule 7(a), *ibid*, nor did Appellee serve and file any Motion under Rule 12 FRCP, or otherwise, against Appellants Fourth Defense and Counterclaim or any part of their Answer.

JURISDICTIONAL FACTS.

Each party sought the aid of the District Court for the First Judicial Division of Alaska to quiet title as against the other to the lode mining claims respectively claimed by each of them, all of which claims are situated on Yakobi Island, except portions of Appellee's Pelican claims 27, 28, 29 and 30 are situated on the foreshore of or in the deep and navigable waters of Lisianski Strait, which bounds Yakobi Island on the east, in the First Judicial Division of Alaska. (Complaint, PR 3-8;

Amended Complaint, PR 53-61; Answer, PR 67-75). Appellants in their Answer pleaded a Compulsory Counterclaim (PR 73-74) for five million dollars actual damages and fifteen million dollars exemplary damages. Trial was had before the Court without a jury.

STATEMENT OF THE CASE.

Appellee on June 23, 1953, filed his Complaint (PR 3-8). On July 17, 1953, Appellants moved (PR 44-46) against the Complaint because of its failure to state a claim upon which relief could be granted and also to make it more definite, specifying, under Rule 12(e) FRCP, its defects and the details desired. In the absence of the trial Court, no hearing was had on that motion, and on August 26, 1953, Appellee filed his Amended Complaint (PR 53-61) wherein he alleged he had located his claims in October and November, 1952 (PR 53), not September and October, 1952 (PR 6) as alleged in his Complaint and described by perimeter courses in three groups (PR 54-57), not in four groups as, also by different perimeter courses than, in his Complaint (PR 4-6). Otherwise, except for some greater details about his discoveries, locating, posting, and recordings, and a reference description to a plat, marked Exhibit "A", attached to and specifically made a part of his Amended Complaint (which plat has not been reproduced in the printed record), his Amended Complaint closely paralleled his Complaint. In neither did he name, describe, or give the number of Appellants' claims, or state the extent of the conflict of any of them with any of the 102 claims he claimed.

In the meantime on July 15, 1953, Appellants under Rule 33 FRCP propounded 47 Interrogatories (PR 11-19), which Appellee answered under oath on August 10, 1953 (PR 20-44), in which he said that Eric Norppa helped locate all of the claims except Mayflower Claims Nos. 1, 10, and 11 (PR 28).

On September 1, 1953, Appellee served notices upon Appellants of taking oral depositions in Seattle, Washington, on September 10, 1953, of Appellant Pape (PR 62-63) and on September 9, 1953, of Appellant Vevelstad (PR 63-64).

Appellee later abandoned taking Vevelstad's deposition, but took Pape's deposition (PR 343-432), which was offered and received in evidence in Pape's absence at the trial as Appellants' Exhibit D (PR 340-343), the learned trial Court stating that if he ultimately ruled it to be admissible he would read it (PR 343), but, notwithstanding the Court had said that Pape was a material witness (PR 135), he later ruled it inadmissible on the ground that it was taken by Appellee for discovery purposes only and that it had been admitted subject to Appellee's Objection (Opinion, PR 99). Appellants do not understand that the colloquy (PR 340-342) between the Court and Appellee's counsel Ward discloses that Appellee objected to the admission of the deposition; in fact, Ward said "I have no objection to offering the 102 pages of this deposition. There is probably $\frac{1}{2}$ a page that I would object to * * *." Whereupon the Court said: "Well, I don't think the Court could consider an objection of that kind because it assumes that the Court is going to dig it out." (PR 341-342.) Appellee's counsel Banfield previously in his oral argument against Appellants' Motion

for Continuance of Trial (PR 76-78) based upon Pape's absence had suggested: "Why don't they prove what Mr. Pape did by that deposition?" (PR 147). Appellants' counsel Robertson was in attendance when Pape gave his deposition, but Appellee's counsel Ward (PR 341) admitted he did not examine Pape.

The Court's refusal to admit Pape's deposition is the subject of Appellants' Statement of Point 5 (PR 718).

Answer (PR 67-75): On September 11, 1953, Appellants filed their Answer, the Four Defenses and Compulsory Counterclaim thereof having heretofore been detailed (Supra, pp. 4-10).

Appellants' First Defense (PR 67) that Appellee's Pleading failed to state a claim upon which relief could be granted was in effect substantially pleaded affirmatively in Appellants' Third Defense, particularly Paragraph 3 (PR 71-73), detailing the manner in which Appellee's locations were not located, described, boundary marked, and discoveries made or certificates of location recorded as required under the United States and Territorial Mining Laws, but, as stated in Paragraph 5, Appellants' Motion for New Trial (PR 108), were located, if at all, unlawfully by blocks, which is the subject of Appellants' Statement of Point 11 (PR 719). Furthermore, Appellee's Amended Complaint (PR 53-61) did not allege; in fact, Appellants contend he did not prove, the definite extent, if any, of the conflict between his purported claims and Appellants' Claims, which is the subject of Appellants' Statement of Point 16 (PR 720) and which failure of allegation and proof is within the scope of Appellants' Statement of Point 18 (PR 720), and of

Paragraph 14 of Appellants' Motion for New Trial (PR 109).

Appellants' Second Defense (PR 67-68) while generally speaking constitutes a qualified denial of the allegations of Appellee's Amended Complaint further alleges that Appellee's pretended 102 lode mining claims constituted a cloud upon Appellants' title to their 27 lode mining claims.

Appellants' Third Defense (PR 68-73) also alleged that Appellee's pretended 102 lode mining claims, their locations and recording of pretended location notices constituted a cloud upon Appellants' title to their 27 lode mining claims, and affirmatively pleaded their prior location, with the details thereof as well as of the posting, marking and blazing boundaries, recording of certificates of location, and prior use and possession, and the detailed defects in Appellee's pretended locations, discoveries, markings, blazings, and recordings.

Appellant's Fourth Defense and Counterclaim (PR 73-74) pleaded a Counterclaim, denominated as such under Rule 7(a) FRCP, which was Compulsory, Rule 13(a), *ibid*, and required a Reply under Rule 7(a), *supra*.

Appellee's failure to Reply as well as to deny by evidence Appellants' proof through witness Vevelstad (PR 544-550) that Appellants had suffered five million dollars actual damages and fifteen million dollars exemplary damages is the subject of Appellants' Statement of Point 10 (PR 719) and 18 (PR 720).

Appellee on September 21, 1953, moved for an immediate trial (PR 75). On October 2, 1953, the Court set the

trial for December 14, 1953, to follow another case (PR 76). Appellants submit that minute order does not fully show what occurred on October 2, 1953; but that the full details are stated in Appellants' counsel Robertson's affidavit, which has never been denied, of December 14, 1953, viz.:

“That affiant, in open court, on October 2, 1953, when Plaintiff's attorney, Norman C. Banfield, requested that this action be set for trial on December 14, 1953, then informed the Court and said Banfield that affiant understood that Pape would be in the Military Sea Transportation Service in the Far East on December 14, 1953, and would not be able to be present on said suggested trial date; that the Court then stated, as affiant understood, that if that situation arose, affiant, on behalf of Defendants, could file a motion for trial at a later date;”

and of his statement on oral argument:

“And I understood your Honor then to tell me, ‘Well, if that is true, you could file a motion to that effect and have it continued’ ” (PR 137),

other than Appellee's counsel Banfield in his oral argument against Appellants' Motion for a Continuance (PR 76-78) said:

“And, when the Court told Mr. Robertson, not that he could come in here and file a motion, that wasn't what the Court said. The Court said: ‘Well, if your party can't be here, you can make the proper showing’ ” (PR 149).

Appellants' counsel doesn't claim an infallible memory, but does contend that in any event a proper and sufficient showing was made for a continuance.

Appellants further protested holding the trial on December 14, 1953, or until after February 1, 1954, by writing on October 7, 1953, a letter (Appendix p. 17) to Appellee's counsel Faulkner, Banfield & Boochever, a copy whereof was transmitted to the Clerk of the trial Court (PR 85-86), and by writing on November 12, 1953, a letter (Appendix p. 18) to the trial Judge and by writing on November 28, 1953, a letter (Appendix p. 19) to the trial Judge, wherein he informed the Court that Pape was now on a government vessel enroute or on a secret mission to the Far East and would not return to the States until the latter part of January (1954), and that Appellants were filing their hereinafter mentioned Motion for a continuance of the trial, a copy of which letter with copy of said Motion was delivered to Appellee's said counsel, who acknowledged receipt thereof by their letter of November 30, 1953, to the trial judge, and by writing on December 7, 1953, a letter (Appendix p. 20) to the trial judge, informing him of Pape's absence in the Far East in the Military Sea Transportation Service and that there was no means of obtaining his return by December 14, 1953, a copy of said letter was mailed to Appellee's said counsel who acknowledged receipt of it by their letter of December 8, 1953, to the trial judge (PR 85-86; 137-138).

Appellants' counsel's letter of December 7, 1953 (Appendix p. 20) was written prior to their being informed by attorney Banfield that the Court intended to deny their motion for continuance but after Appellants on November 30, 1953, filed their Motion (PR 76-78), which was verified by Appellants' counsel on information and belief.

No refutation is made of Appellee's counsel Banfield's telephone conversation with Appellants' counsel Robertson on December 8, 1953, and that that was Appellants' first knowledge that the learned trial Court intended to deny their motion, viz.:

Banfield: "You know Judge Folta is not going to pay any attention to your motion." Robertson: "No; I have never heard from Judge Folta in any way about it. I have given you copies of various letters I have written to Judge Folta about it." Banfield: "Judge Folta told me just before he left for Anchorage" (December 1, 1953) "he wasn't going to pay any attention to your motion because you made it on information and belief." Robertson: "Well, I have tried to give you notice ever since October 2nd that we couldn't possibly go to trial on December 14, 1953, that Mr. Pape would be in the Far East." Robertson: "I am still standing on that motion" (PR 137).

which statement attorney Banfield substantially admitted (PR 149) in his oral argument against Appellants' Motion for continuance, and in which telephone conversation he also said that Appellee was filing Appellee's counsel Ward's affidavit (PR 78-81) in opposition to Appellants' Motion, which affidavit was filed on December 8, 1953, and wherein Ward stated he had talked between July 20 and August 31, 1953, about a settlement with Pape (PR 78-79), which was subsequent to Appellants' service on July 15, 1953, of their Interrogatories to Appellee (PR 11-19), also after July 22, 1953, subsequent to Appellants' service on July 22, 1953, of their Motion for Production and Inspection of Documents (PR 47-48), also after July

28, 1953, subsequent to Appellee's Motion for Extension of Time to Answer Interrogatories and Ward's affidavit of July 28, 1953, (PR 49-50), also after August 10, 1953, subsequent to Appellee's Answers to Interrogatories (PR 20-44) (*all whereof Appellants submit discloses that attorney Ward talked with Pape about this suit after knowing that Pape was represented by counsel therein*).

Thereupon Appellants on December 14, 1953, filed in support of their *Motion for Continuance* (PR 76-78) Appellant Vevelstad's supplemental affidavit (PR 82-83) and Robertson's supplemental affidavit (PR 83-87) together with the Military Sea Transportation Service's original letter stating that Pape was employed as Chief Electrician aboard ships by that Service and was then on a voyage to the Far East and the ship would not return to Seattle until after December 15, 1953, and that it was impossible for Pape to return to the United States ahead of the scheduled return of his ship (PR 87-88).

Appellants were then unable to file an affidavit by Pape to refute Ward's affidavit (PR 78-81) or for any other purpose because he was then on the Pacific as stated in the Military Transportation Service's letter (PR 87-88) and in Vevelstad's affidavit (PR 82-83), and as shown by Ward's affidavit (PR 79-80) whereby it clearly appears that Ward knew when he made his affidavit on December 1, 1953, that it couldn't be refuted by Pape because the latter was on the high seas.

With this showing before it, the Trial Court on December 15, 1953, denied Appellants' Motion for Continuance and required them to go to trial in the afternoon of that day unless the Appellants' would pay lump sum costs of

\$2700, which Appellants refused to do (PR 88-89), in the itemization whereof the Court said it was not interested (PR 156).

The December 15, 1953, order denying Appellants' Motion for Continuance was made after oral argument by both parties' counsels (PR 135-159) during which no denial was made of Appellants having given advance notice that they could not go to trial in Pape's absence to both the Court and Appellee through the four letters (Appendix pp. 17-21) as stated in Robertson's affidavit (PR 85-86) and in his argument (PR 136-137).

At the close of the argument Appellants informed the Court that they contended a denial of their motion was an abuse of discretion (PR 158), which abuse of discretion is the basis of or involved in Appellants' Statement of Points 1, 2, 3 and 4 (PR 717, 718).

EVIDENCE.

Exhibits (PR 133-134): None are printed in the Printed Record, except Pape's deposition, Appellants' Exhibit D (PR 342-432); nor is the map that was marked as Exhibit A attached to and incorporated (PR 58) in the Amended Complaint (Rule 10(c) FRCP). Appellants will later specify those exhibits which they include in the Appendix hereto.

Appellee's Case in Chief: Three witnesses, i.e.: Johnson (PR 160-211), a surveyor, who was not a witness to or present at the locating of any of either Appellee's or Appellants' claims, but who first was on Yakobi Island

about six months after Appellee's claimed locations and about ten months after the last of Appellants' claims were located except Svere 3 on June 8, 1953 (PR 169), when Johnson was not on Yakobi Island (PR 182); Norppa (PR 211-265), a Canadian mining engineer (PR 226), who helped Appellee stake Appellee's claims (PR 212-213) in October and November, 1952 (PR 53); who made no examination of the outcrops and made no discoveries (PR 251) and put up no discovery posts (PR 226-227); who couldn't tell how the veins run and had no idea (PR 230); who didn't put all the corner monuments on any one of the claims (PR 248); who described the posts and monuments that he constructed as some of the trees were quite good sized and some were small, but didn't know the average size of the rock monuments; just made a pile, pretty good size (PR 232); and who couldn't recall what procedure they used in running lines in November, 1952 (PR 238); and Appellee himself (PR 265-326), a self-admitted Canadian citizen (PR 265) and graduate mining engineer (PR 265); whose previous familiarity with nickel ores on Yakobi Island had been gained from mining bureau reports (PR 268); who described the norite outcrops on Yakobi Island as of a size as many as 6 or 7 claims in width to cover the norite outcrops; large masses on the surface crop up through the overburden; the Bureau of Mines' work in digging on low ground, some of which is covered with overburden, and making pits and exposing the underlying norite, indicates the values were disseminated irregularly through the norite; the largest deposits of ore were up to 200 feet thick, and up to 1000 feet long. A great many small

ones are scattered through the norite mass; outcrops on the surface are indicated by rust; the ore is contained in the norite rock and is recognizable by rusty stains. I closely examined the ore. I broke a great many pieces of rock that were rusty on the surface. In every instance I found effects of mineralization through the rock when I broke into fresh rock that was rusty on the surface (PR 265-271). On all claims where I put discovery posts I followed along the claim's center line until I came to a rock outcrop showing rust, indicating mineralization, where I put the discovery post. In every instance I went along the line to where the rock was massive and in place, rust on the surface, that when I broke it with an axe showed mineralization (PR 271-272). I didn't take samples from each claim. I took samples of the ore for my own information to determine just what was ore and to check the Bureau of Mines' statements. I took those samples for my own information from the pits and from the tunnel and various parts where the Bureau of Mines opened up some ore. When I made a discovery I just knocked off a piece of rusty norite with my axe, took a look at it and convinced myself there was sufficient mineralization there to constitute a valid discovery (PR 322-323). A few of the claims are singles. Most of them are made by pairs, by which I mean they have common end lines one running one way, and the other running the other (PR 313-316). In Yakobi 9 location notice I stated it ran 1500 feet southwest from the point of discovery which is not correct to the extent of some 30 or 40 feet. In Yakobi 1 location I didn't take into consideration the discovery was 20 feet southwest of the northeast center end post. In Yakobi 10 location notice I didn't

take into consideration that the discovery was 20 feet northeast of the southwest center end post. In Yakobi 11 location notice I stated discovery was 300 feet southwest of the northeast center end post, but that the claim ran 1500 northeast from discovery. In Yakobi 12 I said the claim ran 1500 feet northeast from discovery, although I said discovery was about 40 feet northeast of the southwest center end post (PR 301-305). I didn't ever go myself around the entire boundary of any of those claims (PR 324).

Documentary evidence: A map, *Appellee's Exhibit 1*, which was admitted after Appellee said he offered it in connection with Johnson's testimony (PR 166) and he would connect it up, Appellants having objected that Johnson's evidence was too remote (PR 165), which map Johnson said was prepared in the office (neither the place where nor draftsman's name being stated) from field notes made by Johnson, Stahl, and Kenniston in November and December, 1953 (PR 166), Stahl, who was not called as a witness, having measured the greatest share of the claims and having been helped by Breseman, who as well as Kenniston was not called as a witness, Johnson himself not having been on some of the claims (PR 200-201); the map is not complete (PR 188). I didn't place the descriptions on this map according to the location notices. We didn't amend the locations. We didn't follow the location notices when we were on the ground to make this map (PR 193-194). Norppa said the legends on Appellee's Exhibit 1 are correct; the red line on it showed his traverse around the claims and the side and end lines which he marked; the red circles, each

place where he put a location notice (PR 249-250), also the one witness corner he put in (PR 257). Appellee said that the Pelican and other claims that he hadn't been up to showed on Appellee's Exhibit 1 also the map, marked Exhibit A attached to and incorporated in his Amended Complaint (PR 58) (which map has now been detached from the Amended Complaint, but which should not be confused with Appellants' Exhibit A (PR 244)); also said map attached to his Amended Complaint showed all claims he claimed in this suit and showed the Takanis, Juneau and Pelican groups (PR 296-298); all center end posts he put in are marked on Appellee's Exhibit 1 with a green circle. Norppa put in the others. Appellee put up all location notices that Norppa didn't put in. In November Appellee put in all the corner and center end posts on Pelican 15, 16, 24, and 25. Norppa put in Pelican 28, 29, 30. Appellee put in the discovery posts and location notices on all of Takanis, Juneau, and Pelican groups (PR 298-301).

39 claim location notices of Appellee were admitted as *Appellee's Exhibit 2* (PR 288) over Appellants' objections (PR 287). (Three of these notices are reproduced in the Appendix, pp. 78-83.) Appellee said the posted notices are identical with those recorded (PR 285).

Appellee's Pelican 15, 16, 25, 26, 28, and 30 location notices were admitted as *Appellee's Exhibit 3* and Pelican 29 location notice, which Appellee said he had not signed, as *Appellee's Exhibit 4*, over Appellants' objection (PR 293), after Appellee's counsel announcing that those seven claims were involved with Appellants' 3 Beach claims, but not shown on Appellee's Exhibit 1; that other-

wise the Juneau, Takanis and Pelican groups were not involved (PR 289-291). Appellee said there is a large outcrop of norite about 150 feet across with a large rusty stain outside of that on the claim; we located those claims completely in the same manner; we ran the lines around to complete the staking of the claims; we put all the corner, end, and discovery posts on the claims. The discovery posts are immediately adjacent to the norite outcrops. He posted them (PR 291-293).

Appellee's Exhibit 5 is Horn's deed reconveying the claims to Appellee (PR 325), who had previously conveyed them to Horn (PR 323).

During Appellee's Case in Chief, *Appellants' Exhibit A* was admitted (PR 244), U. S. Geological Chart, upon which Norppa said they laid out their plan of locating claims (PR 241-243). Appellee also said they used it in determining how to draw the lines of these claims, adopting some of the claim names, and drawing the mining claim locations thereon, which they laid out on the originals in the evenings (PR 277-281), having made a plan, not to take and run the boundaries around each claim by itself, but to run the end line of a number of claims and then the side lines of a number of claims to save going over the same lines 2 or 3 times (PR 277).

Appellee's attorney Ward said: Norppa didn't run all the lines. They used a rather peculiar method. They had planned before they went there. They apparently had these maps, which Mr. Robertson mentioned, where each one of them had certain lines they were going to run, and agreed with the Court's view that it was immaterial to show what lines Norppa ran (PR 214-215).

Appellants' Exhibit B, 27 lines (changed to 25 lines, PR 310) of Appellee's sworn answer to Appellants' Interrogatory 9, was admitted on his cross examination (PR 308).

Appellants' Exhibit C, a plat or sketch of Appellee's 102 claims filed by him with Recorder Richards of Sitka when he filed his location notices for recording, was admitted on his cross examination (PR 309). Appellee admitted that subsequently to when he and Norppa were on the claims in October and November, 1952, he had moved the Portia 5 discovery post and notice 70 feet, and that of Portia 6 for 60 feet (PR 309-310).

Norppa said in October, 1952, Appellee and he located 37 lode claims on the ground in 5 days. We worked from sunrise to sunset. I had difficulty walking home because it was already dark. It was raining. It was cloudy (PR 235-236). Appellee also said the October, 1952, weather was raining most of the time, occasionally a bit of sleet; very disagreeable weather (PR 316); November, still raining and sleeting, weather very bad (PR 323).

Appellee did not call as a witness: O'Donnell who was with Johnson in June, 1953 (PR 162); Stahl or Kenniston who were with Johnson in September, 1953 (PR 163); Stahl, Kenniston, or Breseman who were with Johnson in November and December, 1953 (PR 166; 200), although Johnson said he hadn't been over some of the claims and lines and that Stahl and Breseman went over some of the lines as a separate party (PR 201).

Presumably Norppa was not on Yakobi Island in September, November, or December, 1953, because neither he nor anyone testified to his presence then.

Appellee did not prove on his case in chief the extent of any conflict between his claims and Appellants' claims, other than Johnson said Appellants' claims in conflict are those north from the areas that aren't marked off into claims; I didn't mark on Appellee's Exhibit 1 any place to show the conflict (PR 177), or even mention them. Appellee's attorney Ward said Appellee's Pelican 15, 16, 25, 26, 28, 29, and 30 were involved with Appellants' 3 Beach claims (PR 290-291), nor did he in any manner describe of what the "Bohemia Basin Camp" consisted, which the Court held constituted a permanent monument when he found it referred to the cabin (Op., PR 105).

The Court's view apparently was that Appellants had the burden of showing the conflict as evidenced by its sustaining Appellee's objection to Appellants' effort to ascertain from Appellee's witness Johnson the extent of that conflict. Appellee's counsel then said he had asked nothing of Johnson in respect to Pape's corners or locations, but in due time Johnson would testify in great detail as to them (PR 179-180).

The Court sustained the objection on the ground the evidence was not proper cross examination. Notwithstanding the Court then said "Until they bring that claim out by the testimony of some witness, it would not be cross examination" (PR 180), thereby leading Appellants to believe that the Court agreed with their contention that Appellee had the burden to prove the extent of the conflict of their claims with Appellee's claims. Johnson never testified to Pape's corners until on rebuttal (PR 583).

Norppa was permitted out of turn to testify on rebuttal (PR 254-263), but he in no wise stated the extent of the conflict.

At the close of Appellee's case, Appellants moved (PR 326) for dismissal in accordance with Rule 41(b) FRCP, which the Court after argument denied (PR 340).

Appellants' Case in Chief (PR 343-573): Appellant Pape by deposition (PR 343-432), which was taken in Seattle by Appellee in September, 1953, without cross examination by Appellants (PR 432) said: I have known Vevelstad since 1931 (PR 345); in 1931 I worked about 2 months doing assessment work on Chichagof Nickel Company's mining claims in Bohemia Basin, Yakobi Island, which was the first time I was there (PR 346-349); I was next in Bohemia Basin on June 4, 1950, and was on Yakobi Island between 25 to 30 days at different times that summer (PR 349-350); I went to Bohemia Basin on September 24, 1950, and left October 2, 1950, around noon (PR 354-355); I went to Yakobi Island on June 13, 1952, with Harold Jones, Fred Jones, Earl Larson and Lee Besel, and stayed until July 1, 1952, Larson and Besel are both in the army so far as I know (PR 356-358); I filed with the Sitka Recorder affidavits (this affidavit is Appellants' Exhibit F, PR 434, printed in Appendix, p. 22) of doing assessment work for 1952 on mining claims in Bohemia Basin (PR 382); we repaired the roads and trail, repaired or put in four bridges, did trenching and put in open cuts, some of which are 100 feet long, one 20 feet, 10 to 15 feet wide in solid rock, and 3 to 10 feet deep; we worked about 10 hours a day 7 days a week (PR 382-396); I was on Yakobi Island on April

24 to 28, 1953, with Ed Engdahl (PR 397), and then (PR 399) from about May 3 or 4, with Bruce Cameron who left May 31 (PR 419); he and I did 15 days work on the trail (PR 501); we moved up to the upper camp May 19, 1953 (PR 419); the posts on all 4 Beach claims were in, No. 4 was a new location (PR 404); there was about a foot of snow, deeper in drifts (PR 421); Bruce and I did some blazing when we followed our lines from post to post (PR 421-422); both Hofstad boys came June 6; we had Breseman there (PR 426); Bill Walker was there (PR 404; 426); we did work on the cuts; blasted quite a bit in the open cuts, all through June; Hofstad boys, John Breseman, Vevelstad and I all worked on the open cuts; we put in 20 man hours (five men, 4 days) on the open cuts on the 4 Rita Claims; the open cuts are on the top of the west side rim of Bohemia Basin Rita 2 and 4 about in the middle of the claims, about 20 to 50 feet wide, about 50 feet in the vein, some 20, some 30 feet; they were picked out with pick, shovel, and crowbar (PR 427-430); all of us worked on open cuts on the downhill Hope claims, putting in about 70 man days of 8 or more hours per day, which work was of the same type I have described on the Rita claims and was in June prior to June 25th (PR 430-431).

Although convinced that Pape was a material witness (PR 135) the Court found that Pape's failure to appear at the trial was inexcusable and held that his deposition was inadmissible because plaintiff took it for discovery purposes only (PR 99), without, as Appellants submit, Appellee having objected, at least not properly, to its admission (see p. 12 supra).

Walter A. Richelsen (PR 437-463) said he was an experienced consulting mining engineer and geologist with extensive experience with mining claims and their location in Alaska (PR 438-439); a map, which he had prepared, was admitted, without objection, in evidence as Appellants' Exhibit K (PR 441). The outline in green ink is Appellee's location on the ground of his 102 claims mentioned in his complaint. Its beginning point is Latitude $57^{\circ}57'33''$ North and Longitude $136^{\circ}27'23''$ West, which was taken from Appellee's Amended Complaint (PR 439); the part in green follows their description. The red shade area is that held by the Appellant Aurora Nickel Company and was platted (PR 440) from the location notices which have been put in evidence (Appellants' Exhibits E, PR 433; I, PR 436; and J, PR 437). The map very distinctly shows the conflict between Appellee's and Appellants' claims (PR 440), and the important topographical features which were taken from Plate 2, U. S. Geological Survey Bulletin 931F (PR 441); prepared this map or sketch (PR 441) which was admitted without objection as Appellants' Exhibit L (PR 445) using in its preparation the data from Appellee's Answer to Appellants' Interrogatory 9. I platted only the discrepancy between Yakobi 1 and 2, and the discrepancy between Yakobi 11 and 12; it depicts the result if Yakobi 11 as the location notices say went actually 1500 feet southwest from discovery; it likewise depicts Yakobi 12, 1 and 2 (PR 442). It shows that between the end lines of Yakobi 11 and 12 would be some open public domain (PR 444). I was on Yakobi Island on August 5, 1942, when the Bureau of Mines and the U. S. Geological Survey, under the supervision of the

U. S. Bureau of Mines, were diamond drilling the Vevelstad property (PR 445) to investigate the results and ascertained at that time they had put down about 13 or 14 diamond drill holes and developed about 5,800,000 tons of nickelferous ore averaging about .36% nickel with about 23% copper. The ore deposition and deposits were largely confined to Appellants' claims. It is not disseminated over a vast area from what the findings of the U. S. Bureau of Mines and U. S. Geological Survey studied (PR 446). I was there two days in conference with Mr. Travers of the U. S. Bureau of Mines going over the drilling results and the data obtained by that drilling. I could not personally have gotten it in any other way unless I drilled the property (PR 447). My information was obtained from U. S. Geological Survey Bulletin 931-F, published in 1942 on page 120, of which the Court took judicial notice (PR 462-463). I got the information for outlining the claims in red on Appellants' Exhibit K from Vevelstad and the descriptions in the location notices and also from the bulletin covering the drilling that was used by the U. S. Bureau of Mines for claim data and based it all on this claim of Hope 4, which is right at the tunnel and where a definite location notice is posted. These claims were contiguous and in one group relative to Hope No. 4 (PR 447-456). That map is approximately correct in a general way because those claims are staked covering various ore outcrops and the tunnel lies on Hope 4 (PR 460).

Harold Jones (PR 463-472), a fisherman and carpenter, said: I went to Yakobi Island at Pape's request in June, 1952. My father Fred Jones, Pape, Larson and Besel went with me. We went to Yakobi Island at Bohemia Basin

and unloaded Besel and Larson and supplies. Pape took those two men to show them the property and the mines and where they were to do the work (PR 464). My father, Pape and I then went to the Mirror Harbor claims where we stayed 5 days, returning to the Yakobi Island property where Larson and Besel still were. We 5 men worked there 13 days clearing trails; building bridges that had washed out; rebuilding the cabin on the claim at the top of the mountain. Pape and Larson went up to the tunnel and worked up there. Two of us worked on the cabin and cleared an area (PR 465). I don't know whether there is a Mirror Island (PR 468). My father did trail work in addition to cooking (PR 469). I got \$50 a day for myself and boat; my father \$18 a day and \$2 for food out of that (PR 470).

Harold Hofstad (PR 475-497) said: Last June Pape hired me to do some work for him. On June 5, 1953, my brother and I arrived at Bohemia Basin Camp, and the next morning went up the cabin and found Pape. After having coffee my brother and I returned to the mouth of Bohemia Creek where we met O'Donnell and Johnson who were doing no work there. That same afternoon my brother and I went, after first going to Pelican, to another island, where we were gone 5 days, then returning to Yakobi Island (PR 474-476). We took Breseman to Bohemia Basin, where he went ashore when we returned to Yakobi Island on June 6 (PR 477). We did assessment work at Yakobi Island, mostly clearing out some open cuts in the neighborhood of the upper camp. Vevelstad, Arthur Hofstad, Pape, and I worked there (PR 480). Up to June 25th I was gone 3 days to Pelican. These

other 3 men and I worked together cleaning out these open cuts. We worked from a position in the lowlands between the tunnel and the upper camp of Bohemia Basin, and also considerable work was done to the left, and some was done on the rise above this—what you might say, there is a moderate rise there in the ground, and then there is a steep rise, and there was considerable work done up there in some open cuts that I never was on. Vevelstad, Pape, and Arthur Hofstad were working up there (PR 481-483). I did some on the left hand side of the creek, also on the right-hand side. I open-cut work and used picks, shovels, sledge hammers, wedges, etc. I didn't brush out trail or fix bridges or any trail work (PR 483). Dynamite was used, but I didn't use any (PR 484). While in Bohemia Basin I lived with Vevelstad, Pape, and my brother, who were there all the time (PR 484). While there I helped Vevelstad put up some amended locations. We examined Pape's notices, maybe 4, 5, or 6, which were in tin cans and readable (PR 486). Vevelstad placed the amended locations in new tin cans, which I carried but I don't know whether Pape's notices were put in the new cans or remained in the old cans. I helped Vevelstad set up, readjust, or repair monuments and blazes. Mostly stone monuments. There was very little material to blaze up in that region where Vevelstad and I worked (PR 487).

That upper country is very rugged, steep, canyons, no doubt subject to slides at a great many points. Vevelstad and I found along the Rim and inspected notices, which, although I didn't check the distances, were all placed very closely together. The locations had been filed

with compass directions for the claims were part parallel with the Rim. They were very short claims. In less than 2000 feet we encountered, I think, possibly 4 notices, perhaps 3, perhaps 5, but I think 4, which were double notices—2 notices spaced on different posts which were separated. I didn't measure the distance (PR 488-489). My recollection is they were either Norppa's or Appellee's. I believe that is on the Rita claims. I didn't see around there any other notices in Appellee's or Flynn's name. In my opinion in wandering and manoeuvring around to check Appellants' corner posts we should have encountered any other monuments. It is sufficiently open for that, but very broken up. I worked 9 or 10 hours, maybe more, a day (PR 490-491). A considerable amount of blasting was done. Pape set the blasts. I had rocks spraying around my ears when the dynamite was shot off. Vevelstad was swinging a pick and working along rolling loose and disintegrated material out of these open cuts the same as the rest of us while I was with him; doing the same work I was doing. I don't know whether he was present when any drilling was done because I wasn't there when the drilling was done. I stayed at a lower level (PR 495). Vevelstad made the notices out. I signed some of them as a witness. Presumably either Vevelstad or Pape put them in the cans. I was present when Vevelstad placed some of the notices. I don't know the exact number of claims on which those notices were put. I know I was on the Rita claims. The names of the others escape me (PR 496).

Arthur Hofstad (PR 497-513): My brother and I arrived at Yakobi Island June 5, 1953, and found the

watchman Bill Walker on the beach and the next morning we went to the upper basin and found Pape. We then went to Pelican and got some supplies and brought Breseman and Pape back to Bohemia Basin or to those claims on Yakobi Island. My brother and I then went to Sealevel returning to Yakobi Island in 4 or 5 days and remained there until June 26th or 27th doing assessment work. Breseman returned to Pelican about the time we returned to Yakobi Island from Sealevel. Vevelstad, Pape, my brother and I did open cut work using mining drills and hammers. Pape put in several blasts. I did the drilling. Pape set off the blasts (PR 497-499). Vevelstad and I went over on the 4 Rita claims on Takanis Mountain breaking out rock, using mining drills and we also did open cut work on the other side of the basin (PR 500). My brother, Pape and Vevelstad broke up rocks like the rest of us, using drills, hammers, and picks. I didn't do any trail work. We worked every day, I believe Sundays too (PR 501). I only remember seeing two notices where the Rita claims are. They didn't look 1500 feet apart to me. I helped Vevelstad put up some amended location certificates on the Rita claims. I was present when they were posted in a can where Pape had had locations which were still there and which were left with the amended locations in the cans (PR 502). I worked on both the Hope and Rita claims. I believe I put three days' work in on the Rita claims and that my brother went with Vevelstad on the fourth day and I worked on the Hope claims for the other eight days. I saw them go up there but I couldn't see them doing work. It is too far for that. I repaired a few

monuments. I don't know whether the rock or snow slid them down the hill or what happened to them. I made or renewed two monuments on Appellants' claims on the left hand side of Bohemia Basin. I saw Vevelstad doing work like we did, using picks and mining drills (PR 504). I guess Breseman was there four days. Vevelstad was on Yakobi Island when my brother and I came back from Mirror Harbor. We drilled 30 or 35 holes. I couldn't tell you how many I drilled. We used single jackhammers and had mining drills about 1½ feet long. We took turns drilling. We had 3 or 4 drills and we found some more at Mirror Harbor. I don't know how many boxes of dynamite we had. Pape put 2 or 3 sticks in each blast. I am sure he set off 12 or 14 (PR 506-509). We broke up rocks. Sometimes we would put a wedge in and rock would break out. We didn't have to use blasts on them. Some of it the water leaks down through and broke out, so the rock come out easily. We didn't need dynamite. In some places we didn't need much drilling. I helped Vevelstad amend the Rita claim locations. I helped put some corner posts and rock monuments on the Hope claims. There is a big bunch of them. I did some blazing on the left hand side of Bohemia Basin (PR 509-510). I didn't find on the Rita claims where they put 5 or 6 witness notices all at one spot. Vevelstad wrote out quite a few notices and put them up at the top of the valley where the Rita claims are. I don't remember anything about the Doris claims. The purpose of the drilling was to do assessment work, partly so we could sample these pits. We didn't drill any tunnels. I didn't run any Svere claims lines. I can't say where they are. By our work we ex-

posed fresh surfaces of nickel ore. We re-exposed the same surfaces exposed in the bottom of these pits before they sloughed in (PR 509-513).

Edward Engdahl (PR 513-521): From Pelican to the mouth of Bohemia Creek, Yakobi Island, is about 8 miles (PR 514). I went with Pape early in June, 1950, at his request, to Yakobi Island, and the next day went up to the upper camp in Bohemia Basin and stayed 4 or 5 days; going up the lines and locating old mining locations, re-locating the old stakes; we blazed lines; we put in stone monuments on both sides of the tunnel, on both mountains; we didn't restake any claims then; where we could find the corner stakes we made good blazes on them or put new ones, and did the same thing about stone monuments on top of the mountains (PR 514-518); Pape and I did trail work, both going and coming; we put one new foot-bridge in and repaired others, and got rid of the jam in the creek. I next saw Pape either the latter part of September or first part of October. He was going back to the basin and asked me to go along, but I couldn't. About April 25, 1953, I helped Pape stake a new claim down on the beach at the lower camp. I put in stakes approximately between 4 and 5 feet and between 3½ and 4 inches; blazed on four sides; putting in four corners. I believe the discovery post was put in (PR 518-520).

Appellant Vevelstad (PR 521-573) said: I have been acquainted with Yakobi Island since 1917, locating the ore bodies thereon in 1920 and returning every year until 1926. I built the buildings on the island except the Bureau of Mines built what is called the assay office at the base camp on the beach, which camp I put up

and whose local name is Bohemia Basin Camp (PR 522-524). I have known Pape since 1931. He did the assessment work in 1952 (PR 524-525). I arrived on Yakobi Island June 11, 1953, about noon and went to the upper camp and first checked and found all of Pape's location notices and found Appellee's Yakobi 1, 2, 3 and 4 location notices which are all on that side, and later found eight of Appellee's location notices on Takanis Mountain all bunched together in a string 1400 feet long, making each claim about 200 feet long. The notices or monuments were staggered, that is he put one here and one over there so he would not get parallel end or parallel side lines. Each claim is by itself. There were no side lines. The 4 Yakobi notices were also staggered locations. I found them a little southwest of the tunnel about 60 or 80 feet southwest from Pape's locations whose notices were still there on the 12 Hope, 4 Rita, and 1 Svere claims. I checked all of them. They were in cans placed in rock monuments. Those claims are above the timber line, except for a little timber on Hope 7, 8, 9, 10, 11 and 12, but it is awful steep there (PR 525-528). I located over 1000 claims this last ten years. In that country if there was no heavy rain or sleet, two men could locate in accordance with the statute 4 claims a day. It is the toughest country in the world. Those mountains go up 2400 feet and drop right down. About 1/3 of that country is accessible. Takanis Mountain is the worst mountain in this country (PR 528-529). On arrival on Yakobi Island June 11 I found Pape and Bill Walker there, who was the watchman at the beach where we keep our supplies and stores (PR 529). I remained there from June 11

until the evening of June 25th when the two Hofstad boys, Pape and I, also Walker, left. We had finished the assessment work, having spent over \$3800. The Hofstad boys, Pape and I worked every day from June 13 to about 5:00 o'clock June 25th. The Bureau of Mines never did any work on pits. We cleaned them out to get fresh surfaces to take samples. In that kind of ore if the surfaces are exposed for about one year the sulphur and nickel leaches out and runs away with the rainwater into the soil (PR 529 to 532). In doing assessment work we used hammers, bars and picks. When the surface is exposed to the atmosphere, rain, water, and oxygen, you can pick quite a bit off with a pick or crowbar. We did some drilling. Pape did some blasting, all of it (PR 534). I am familiar with Appellants' 27 claims. I amended the locations of 12 Hope, 2 Doris, 4 Rita and I think 1 Svere claim. The Rita claims are located in from the rim running north and south of Takanis Mountain and are tied into a little lake and a trail coming up the valley. Geological Survey definitely established the latitude and longitude for that lake (PR 535). Bohemia Basin is not a real basin. It is a valley about 1/2 mile wide and about 8 miles long. It cuts the island in two. The light red on Appellants' Exhibit K exactly describes the location of Appellants' 27 claims on the ground. The Mayflower 2 to 9 location notices, part of Appellee's Exhibit 2, are not the same as the notices posted on the ground which state that the claims run northerly and southerly. Those claims are actually on the west slope of the mountain. I found 8 location notices in 8 different monuments, but they are about 20 feet apart and they are staggered

without adjoining end or side lines because there is only one string. That map is not the same as it is on the ground. If each claim is 1500 feet that is 9000 feet but those particular claims only cover 1400 feet in perimeter which I measured with heavy trolling line and ascertained those 8 claims actually covered 1400 feet. Two on the end go overboard into a canyon 400 feet deep and are located on the precipice. They have six separate claims on the bluff without joined end lines, leaving about 10 or 15 feet between end lines or an unlocated fraction. Six claims cover 1400 feet. The location notices say 1500 feet northerly or 1500 feet southerly. This is northwest and southeast. The location notices describes them as being located 3000 feet west of the Bohemia Basin Camp on the north slope of the Bohemia Basin. The north slope of the basin or valley runs north and south and is down at Lisianski Inlet. Appellee's claims are on the west slope. Appellants' Exhibit L correctly illustrates the staggered location without parallel or adjoining end or side lines. None of these Appellee's claims have corner or end posts, just a discovery post (PR 535-541). We put in at least 126 days doing assessment work. I am only personally acquainted with the time put in since I came there on June 11th. I made amended locations in June of those claims covered by the amended certificates that I recorded, marked Appellants' Exhibit J. Pape's locations are in the same cans that the amended locations are in. They are legible (PR 540-543). I base my claim of damages for \$5,000,000 actual loss because Appellee jumped those properties whereas the National Production Authority of the United States was going to finance the

money for the plants, and I would have put in a plant to mine the ore which would have been concentrated and shipped south in concentrates. I had people then who were ready to go ahead under that National Certificate of Authority and still are. Appellee clouded the title. Nobody will go in with a clouded title. \$5,000,000 is only 1/2 of what you would earn annually if you had a plant of that size. A plant operating would earn annually \$60,000,000 of which my share alone would be about \$8,000,000 per year on the royalties alone, besides 25% of the profits. I had a deal on then with legitimate responsible people, one of the biggest engineering firms in the United States. My people quit just as the Howe Sound Company did in 1940 when Banfield and Faulkner and a Chicago lawyer Fisher sued the Howe Sound Mining Company. I had trouble in 1940 with Hans Lundberg and John R. Stirrett, mentioned in Flynn's answer to Interrogatory 35. I base \$15,000,000 exemplary damages because under the Anti-Trust Law you can ask for punitive damages three times the actual damages (PR 543-550). I was on Yakobi Island September 30, 1950, about 6 a.m., and went up and met Pape in the cabin and came down by 10 o'clock (PR 557). Pape and I didn't leave the island that morning on Hildre's boat or go to Mirror Harbor. Pape stayed, so did the other fellow (PR 558). I don't know anything about Pete Brown, named in Pape's deposition, or that he is associated with Pape. I had nothing to do with him (PR 559-560). The position in respect to the Hope claims of the Svere claims on that are correct so far as I know. I

know the other claims are exactly the way they are (PR 560). I brought Pape from Chicago in May and June, 1931, and Pape went over all those claims and knew all about them and the discoveries on them in 1931 and had that knowledge when he made the locations in October, 1950 (PR 568), and in the amended locations I used the same monuments and the same discoveries he had at the same place and found his discoveries actually on the ground (PR 564). The difference in time required to locate six claims on the beach at Sealevel and any four claims in Bohemia Basin is at sea level they are along the shore. You can pull along with a skiff. You don't have to climb any hills. On Yakobi Island you must climb from one valley to another across mountains that are in most cases impossible to climb. Going up to the Rita claims is only one possible trail unless you go way off to the side (PR 568-569).

Documentary Evidence: *Appellants' Exhibit A*, Photographic Copy of U.S.G.S. Bulletin 931-F, Plate 20, was admitted (PR 244) in cross-examination of Norppa. It should not be confused with the map, marked Exhibit A, attached to and incorporated in Appellee's Amended Complaint (PR 58).

Appellants' Exhibit B, first 25 lines of Appellee's answer to Appellants' Interrogatory 9, was admitted (PR 308) on cross-examination of Appellee.

Appellants' Exhibit C, Recorder Richards' tracing of the plat filed with him by Appellee when the latter filed for record his 102 location notices, was admitted (PR 309) upon Appellee's cross-examination.

Appellants' Exhibit D, Pape's deposition (PR 343-432), admitted in evidence (PR 342), but subsequently held inadmissible (PR 99), although the Court found Pape to be a material witness (PR 135).

Appellants' Exhibit E, Pape original location notices of Rita 1 through 4, Hope 1 through 12 (Hope 3 is not actually named on notice), and Svere, was admitted (PR 433) at close of Pape's deposition. Copies in Appendix, pp. 26-59.

Appellants' Exhibit F, Pape's original verified proof of labor, dated July 8, 1952, for assessment year ending noon July 1, 1952, for Hope 1 through 12, Rita 1 through 4, and Svere claims, was admitted (PR 434) at close of Pape's deposition. Copy in Appendix, p. 22.

Appellants' Exhibit G, Pape's deed to Aurora Nickel Company of Hope 1 through 12, Rita 1 through 4, and Svere lode mining claims, dated October 27, 1950, was admitted (PR 434-435) at close of Pape's deposition.

Appellants' Exhibit H, Pape's original verified proof of labor, dated July 3, 1953, for assessment year ending July 1, 1953, for Hope 1 through 12, Rita 1 through 4, and Svere lode mining claims, was admitted (PR 435) at close of Pape's deposition. Copy in Appendix, p. 24.

Appellants' Exhibit I, Aurora Nickel Company's original certificates dated July 1, 1952, for Doris 1 through 4, Takanis 1, Svere 2, Beach 2 and 3, was admitted (PR 435-436) at close of Pape's deposition. Copies in Appendix, pp. 60-77.

Appellants' Exhibit J, Aurora Nickel Company's original amended location certificates Rita 1 through 4, Doris

1 and 2, Hope 1 through 12, Svere and Svere 2, and original location certificate Svere 3, all dated in June, 1953, was admitted (PR 436) at the close of Pape's deposition.

Appellants' Exhibit K, map showing Appellants' claims superimposed over Appellee's claims, was admitted without objection (PR 441) on Appellants' witness Richelson's direct.

Appellants' Exhibit L, illustrative map of staggered staking of Appellee's Yakobi 1 and 2 and Yakobi 11 and 12, was admitted without objection (PR 445) on Appellants' witness Richelson's direct.

Appellants' Exhibit M, Appellee's answer to Interrogatory 15, was admitted without objection (PR 472) at close of Jones' testimony.

Appellants' Exhibit N, small picture of cabin in Bohemia Basin, was admitted without objection (PR 578) at close of Goodwin's rebuttal cross.

Appellants' Exhibit O, snapshot of tunnel mouth in Bohemia Basin, was admitted without objection (PR 646) upon Johnson's rebuttal cross.

The Court took judicial notice of U.S. Geological Survey Bulletin 931-F, published in 1942 (PR 463).

Appellee's Rebuttal, (PR 574-696): Goodwin (PR 574-578) an airplane operator and pilot, said I am acquainted with natural monuments and permanent improvements on Yakobi Island; the camp in Bohemia Basin at the beach is usually referred to as the beach or lower camp; the only other camp is further up in the basin and is a very prominent land mark known by the name of the Bohemia

Basin or upper camp (PR 574-575); I have flown over it many times; I never landed on Takanis or Lynn Lake; I flew within 20 feet of the camp in the basin; Pros Ganty told me it was called the Bohemia Basin Camp; I recognize the picture, Appellants' exhibit N, which was admitted in evidence without objection (PR 578) and flew within 20 feet of that cabin (PR 575-578).

Hildre (PR 592-606), who was called out of turn, said Velvestad employed him and his boat in September, 1950, to make a trip, of which I didn't keep a log; we left Juneau September 29 for South Lisianski, what they call the Bohemia Camp, at the outlet of Bohemia Creek arriving there 6 a.m., September 30; at 9 a.m., Pape came aboard the boat and we left for Sealevel where the whole gang went ashore and Velvestad put up some notices which I didn't examine. Pape was with us. Then we went back to Bohemia Basin. On October 1 we left Bohemia Basin and went to Sealevel. Pape was with us. We then went to Pelican and to Juneau, where we arrived October 2, where Pape got off (PR 592-600). We picked Pape up October 1 about 9 or 10 o'clock a.m. I have no record of it (PR 600-601). I can't remember whether Pape went ashore with Velvestad and my deckhand at the point north of Takanis Bay whence we returned to Bohemia Creek the evening of October 1 and where Velvestad went ashore. I imagine Pape did. We left Bohemia Creek about 10 or 11 o'clock October 2 returning to Juneau (PR 604-606).

Johnson recalled (PR 578-592; also 607-652), identified Appellee's Exhibit 6, which was admitted, and said correctly showed the corners and rock mounds of Svere,

Rita 1 through 4, and a certain number of Hope claims, which lines, monuments and posts he surveyed in September, 1953 (PR 578-580); he was not over the entire east line of Hope and Svere claims in May, 1953 (PR 588); there is nothing found in May that is on that map, not a thing, except one post now marked Hope 1, 2, 3, 4 (PR 590); the mounds he found could have been made in 1950 (PR 591); he found some new blaze lines alongside older blaze lines, freshly blazed trees mingled amongst an older set of blazes that had been made the fall before (PR 608). These older blazes were on the Yakobi claims between the Yakobi posts and alongside until they reached Yakobi 4 center end post; he found a freshly marked, squared tree, a joint line, Hope 1 and 3 (PR 609); that map shows all monuments, posts, squared trees, and blazes other than Appellee's, which could have been made between 1950 and 1953 (PR 612); Exhibit 6 correctly shows all Hope, Rita and Doris claim monuments, corner, and center end posts we found on the ground (PR 613). He later found other posts not shown on Exhibit 6 along center end between Hope 7, 8, 9, 10, 11, 12. The map doesn't show the Pape claim blazes where they continue up towards their discovery or center end of 6, 7 and 8. That can hardly be blazed in there. That line is also blazed where I show 3 new posts (PR 614-615). That plat shows all of Pape's corners or monuments. He found Pape's location notices in June, 1953, in cans either in rock mounds or nailed to a tree. A squared tree was at the center post and discovery for Hope 9 and 10, a discovery post with can on each side. He read the one for Hope 10 the last day in November,

1953. At the top of it Pape had written, "I, William L. Pape, October 1, 1950" and then the bearing, and distance, and size of his claims, and at the bottom "This claim was discovered October 1, 1953." (PR 616-617). I have a photographic film of it. The transparent map, which was admitted Appellee's Exhibit 7, shows the Hope, Svere, and Rita claims. It and Appellee's Exhibit 1 are made on same scale, from same survey with same coordinates and various points correlated (PR 618-619). In May and June I checked parts only of Yakobi 1, 2, 3, 4, and 5, Betty 7 and 8, just partial on one line there; I looked at several corners of the Pelican claims, and saw parts of Portia 4 and 5. I didn't check all of Appellee's locations in September, 1953, and didn't find any new stakes, posts, monuments, blazes that had been put on any of Appellee's claims (PR 626-627). I didn't find in November or December, 1953, the post I have green circled on Appellee's Exhibit 1 (PR 632). Appellee's Exhibit 6 only shows the relationship of the corners and those lines. You don't have to draw in the lines. You can connect them up (PR 638-639). I don't recall any such thing as the upper line. These are located on a hill above the tunnel. It doesn't show the contours on the map (PR 642-643). Appellee wasn't with me all the time in May, 1953 (PR 643-644). Appellants' Exhibit O, a picture, was admitted without objection (PR 646). Johnson said it looked like the Yakobi Island country (PR 645). I was on the Mayflower in May, 1953. Appellee's Exhibit 8, a kodachrome slide, was admitted (PR 650-651). I took the slide of the notice upon center end discovery post Hope 10, then finding in the same can Aurora Nickel Company's amended certificate location (PR 652).

Harrigan (PR 652-677), a surveyor, with Appellee arrived at Bohemia Basin May 14, 1953, meeting at the beach Pape who was very cooperative, so we started toward the upper basin on what is known as the upper trail, intersecting about 800 feet from the beach camp a line of blazes, and immediately adjacent to the trail was a squared post marked Pelican 24, 25, 28, and 29, and about 500 feet farther up the trail Pape said: "Now you are coming to the back line of my beach claims" and about 200 feet further up I intersected 3 blazes (PR 652-654). The night before in plotting Pape's Hope 6 through 12 locations I approximately established they laid somewhere beyond Bohemia Creek's forks or big elbow or bend (PR 656). Over Appellants' several objections (PR 655; 660; 661; 666; 667; 668), Harrigan testified almost entirely in narrative form, and to a report or affidavit to Appellee's counsel (PR 667-669), which was not in the record. Harrigan said he gave Appellee the description of Appellee's claims used in Appellee's Complaint and Amended Complaint taken from Appellants' Exhibit A (PR 669-670); the only time he was on Yakobi Island was 7:20 am to 4:40 pm May 14, 1953 (PR 672-673); in making his statements he knew Pape was unavailable to contradict him (PR 673); snow was no problem maybe for an area 400 or 500 feet either side, especially on trail's lower side; spotted; considerable snow in higher elevations; around the cabin 12 or 14 inches (PR 674-675).

Klein (PR 677-696) said he was on Yakobi Island November 25 to 28, 1953, to investigate age of certain marks on trees and covered all this line from Sverre 3, Sverre 2, and Sverre claims, Hope 5, 3, and 1, Doris 1 and 2,

and those 3 corners of the Sverre claim, all whereof were live trees except the common corner of Hope 1, Doris 1 and 2 (PR 679). No blazes or cutting into any tree indicated any blazes of an age of less than 13 or more than 3 years old. I didn't see any. None of Pape's blazes could have been made in 1950 and reblazed in 1953 (PR 683-684); all the trail work between the beach at Bohemia Creek's mouth and the cabin during 1951, 1952, and 1953, he appraised at 6 man-days 8 hours daily (PR 686-689); "It is all my opinion" (PR 695).

Documentary evidence: Appellee's Exhibits 6 (PR 680), 7 (PR 619) and 8 (PR 651-652) and Appellants' Exhibit O (PR 646) were admitted during Appellee's rebuttal.

Appellants' Surrebuttal: Vevelstad (PR 696-699) said Appellants' Exhibit N was taken on level ground, shows the big cabin, Baldy Mountain, and takes in most of Hope 1, 2, 3, 4, 5, 6 claims. The trees are probably from 20 to 40, 50 feet high. In June, 1953, they were of that height (PR 696-697). I took the picture, Appellants' Exhibit O of the entrance of the tunnel into the mountains. It is the place Johnson was talking about when he said it was easy to see through the country, see monuments, blazes, or anything of that kind. In Seattle last spring Harrigan told me he found 5 feet of snow around the cabin. He called at my hotel (PR 698-699).

QUESTIONS PRESENTED.

The questions presented by Appellants' 18 Points (PR 717-720), are whether the Court abused its discretion in (1-PR 717), requiring Appellants to go to trial in Pape's

absence (PR 88; 135-159); (2-PR 717) giving credence to Ward's affidavit (PR 78-81; 82-83; 86-87; 87-88; 93-95; 158); (3-PR 718) disregarding Appellants' request to adduce Pape's evidence before decision was rendered (PR 95); and (4-PR 718) in requiring the Appellants, particularly Vevelstad and Aurora Nickel Company (PR 153) to go to trial in Pape's absence and (5-PR 718) in holding Pape's deposition was inadmissible (PR 99); the Court erred (6-PR 718) in not considering Richelson's testimony which was based upon U.S. Bureau of Mines data (PR 447; 462) whereof the Court later took judicial notice (PR 463), but said Appellants' Exhibit K was of little value although offered as illustrative (PR 461); (7-PR 718) in holding that Bohemia Basin Camp, to which most of Appellee's location notices were tied, constituted a natural or permanent monument and referred to the cabin (PR 105) although no evidence was adduced to that effect; in fact, several witnesses, including Appellee's witness Hildre referred to the camp as being at the mouth of Bohemia Creek (PR 595) as did Vevelstad (PR 522-524); and in denying Appellants' Motion for a New Trial (PR 107-109) and in disregarding (8-PR 718) Pape's affidavit (PR 109-112) which refuted Ward's affidavit (PR 78-81) as well as (PR 111) Hildre's testimony that Pape had left Yakobi Island on October 1, 1950 (PR 599), not October 2 which was the departure date admitted by Hildre on cross (PR 605), and (9-PR 718) Peter Brown's affidavit (PR 113) that Pape and he left Bohemia Basin on the forenoon of October 2, 1950, and Breseman's affidavit (PR 116-118) that with Stahl, who as well as Breseman was not called as a witness by Appellee, in November and December,

1953, he had checked and found Appellants' Hope claim boundaries blazed and their corner and discovery posts in place and visible and that Stahl said he had never seen claims better marked than Pape's claims, Stahl admittedly having measured the greatest share of the claims and with Breseman having gone over some of the lines as a separate party (PR 201); and (10-PR 719) in disregarding Appellants' affirmative plea for relief in and proof of their Compulsory Counterclaim (PR 73-74), which was refuted by neither reply nor evidence; and (11-PR 719) in holding Appellee's 49 claims (PR 119-121) were located and certificates of location thereof recorded as required by United States and Alaskan mining laws; and (12-PR 719) in rejecting Appellants' affidavits of assessment work, Exhibit F and H (Appendix, pp. 22-25) as prima facie evidence of doing the work and making the improvements therein stated; and (13-PR 719) in disregarding Appellee's failure by reply brief to refute the law or the facts as stated in Appellants' trial brief (PR 108); and (14-PR 719) in not requiring Appellee to sustain the burden of proof of his claim for relief and in placing the burden upon Appellants (PR 108); and (15-PR 719) in not requiring Appellee to rely upon the strength of his own title (PR 108); and (16-PR 720) in not requiring Appellee to prove the definite extent, if any, of the conflict between his claims and Appellants' claims; and (17-PR 720) in not regarding Appellee's self admitted, volunteered disqualification to locate mining claims in Alaska because he is a Canadian citizen (PR 265); and (18-PR 720) in entering its judgment (PR 119-122) contrary to law and evidence (PR 109).

ARGUMENT.**ABUSE OF DISCRETION BY THE TRIAL COURT.**

Questions and Points 1, 2, 3, and 4 (PR 717-718).

Appellants respectfully urge that the learned trial Court exercised its discretion arbitrarily and capriciously in forcing them to trial, unless they paid unspecified costs of \$2750 (PR 154) or \$2700 (PR 88), in the itemization whereof the Court was not interested (PR 156), in the absence of Appellant Pape, who was more than 100 miles distant from the place of trial at the time thereof (Military Sea Transportation Service Letter, PR 87-88; Vevelstad affidavit, PR 82-83), not at Appellants Vevelstad's or Aurora Nickel Company's procurement (PR 82-83; 83-88), who urged they were entitled to have the trial postponed (PR 137; 153).

The Court seemingly thought those two Appellants should have subpoenaed Pape (PR 153), which they could not do under Rule 45(e)(1) FRCP because Pape was in Seattle (PR 79; 82-83; 87-88), which is more than 100 miles from Juneau, the place of trial, and outside of Alaska, and they did not know Pape would absent himself from the trial (PR 82-83).

The Court held Pape to be a material witness (PR 135-136), but refused Appellants even a continuance until the next day and insisted upon going to trial the same day (PR 157), clearly doing so upon its credence of Ward's affidavit (PR 78-81), Appellee's only verified statement opposing the continuance. Ward therein admitted he had talked with Pape on several occasions between July 20 and August 31, 1953, about settlement (PR 78), [during which period of time Pape was represented by

counsel who was unacquainted with the occurrence of those talks (PR 153-154)], and knew that Appellants could not then obtain Pape's affidavit (PR 85), the absence whereof the Court criticized (PR 153), and ignored entirely Appellants' Motion for Postponement (PR 76-78), Velvelstad's and Robertson's affidavits and Military Sea Transportation Service's letter (PR 82-88) and Appellants' Objections in Court on October 2, 1953 (PR 137; 149) and letters of October 7, 1953, November 12 and 28, 1953, and December 7, 1953, to either the Court or Appellee's counsel (Appendix, pp. 17-21, also, *supra*, pp. 16, 17, 19), and the Court's failure on December 1, 1953, when it informed Appellee's counsel that it would deny Appellants' Motion for Postponement because Robertson had verified it on information and belief, to likewise so inform Appellants' counsel, which the trial Court did not controvert (PR 137; 149), which knowledge so received from Appellee's counsel misled Appellants into thinking that their Motion for Postponement would be granted upon their supporting as far as possible their said Motion by actual knowledge which they sought to do through Velvelstad's and Robertson's supplemental affidavits and the Military Sea Transportation Service's original letter (PR 82-88).

The Court's attention was directed to these abuses of discretion by Appellants' Motion for New Trial (PR 107) supported by Brown's affidavit (PR 113-114), Breseman's (PR 114-115; also 116-118) and Pape's (PR 109-112) denying Ward's (PR 78-81) and stating he, Pape, desired to be a witness at the trial in order to protect his interests, that Ward had made offers of settlement and employment to him in a new company (PR 110-111) and

that he would have lost his government job had he not made the trip on the Marine Lynx on November 26, 1953, to Korea (PR 109) and that he had requested his counsel to apply for a continuance until after January 1, 1954, so he could attend the trial, and that Ward was anxious to hold the trial without Pape's presence so the latter could not testify (PR 112). While the Court seemingly, in finding that Pape had wilfully absented himself from the trial (PR 152), forced Appellants to immediate trial (PR 88; 157), because Pape personally had made no affidavit (PR 153) in support of Appellants' Motion for Postponement (PR 76-78), it disregarded in denying (PR 118) Appellants' Motion for New Trial (PR 107-109) not only Pape's affidavit (PR 109-112) but also the unrefuted proof (PR 93-97) called to the Court's attention in Appellants' brief that Ward had deceived the Court in regard to his status as a practicing attorney in Seattle, Washington.

Appellants submit that a court of equity should have heeded that deceit and that, had the case been one for a jury, the Court would have been bound to instruct the jury, i.e.:

" . . . They are, however, to be instructed by the Court on all proper occasions:

"First . . .

"Second . . .

"Third: That a witness wilfully false in one part of his testimony may be distrusted in others."

Sec. 58-5-1, ACLA 1949.

Furthermore, Ward had admittedly had several conversations with Pape about a settlement out of Court

(PR 78), and did not deny they were had out of Court and in the absence of Pape's counsel (PR 153-154).

Ward's misconduct, which was disclosed by his own affidavit (PR 78-81) to the Court, was unethical:

"A lawyer should not in any way communicate upon the subject of a controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel . . ."

Canon 9, American Bar Association Canons of Professional Ethics, 1947, p. 8.

and should have aggravated in the Court's mind in its exercise of sound discretion that deceit.

Judicial credence of Ward's affidavit (PR 78-81) clearly prejudiced Appellants.

The Court being convinced that Pape was a material witness from reading the affidavits, motions and "so on" (PR 135-136), which apparently were Appellants' verified Motion for Postponement (PR 76-78) and Vevelstad's and Robertson's affidavits (PR 82-88) and Robertson's four letters to either the Court or Appellee's counsel (Appendix, pp. 17-21), [because the Court so found prior to the oral argument on December 15, 1953 (PR 135-159)], even Appellee admitted Pape was an important witness (PR 147), it scarcely seems necessary to point out to what material evidence he testified in his deposition, Exhibit D (PR 343-431), other than he was in Bohemia Basin from September 24 to October 2, 1950 (PR 354-355; 373-376) and did the assessment work in 1952 (PR 382) and in 1953 (PR 427-431), [which would have sup-

ported his location notices and certificates of location, Exhibits E and I (Appendix, pp. 26-77) and his proofs of labor, Exhibits F and H (Appendix, pp. 22-25) and contradicted Ward's affidavit that Appellee had overwhelming proof that Pape did not locate any mining claims in Bohemia Basin in October, 1950, or prior to Appellee's locations (PR 80)]. Pape's affidavit (PR 109-112), which the Court ignored in denying (PR 118) Appellants' Motion for New Trial (PR 107-109), also clearly shows the materiality and importance of his evidence.

Appellants respectfully submit the trial Court arbitrarily and capriciously exercised its discretion in rejecting Appellants' request to reserve its decision until Pape's evidence could be adduced (PR 95) and that as a court of equity it had inherent power to do so. Moreover, Rule 52, FRCP (Appendix, pp. 16-17), undoubtedly empowered it to do so.

Hernberg v. Tipton, CCA, Ill. 1943, 133 F2d 67, 69.

Rule 53(e)(2) in regard to Masters provides: "In non jury actions . . . The Court after hearing . . . may receive further evidence. . . ."

If a court may receive further evidence after a master's report, surely a court of equity may do so after conducting its own trial or hearing.

The trial Court recognized this power in

George v. Lyons, 110 F.Supp. 711, 713, 14 Alaska 241, 244.

Without reiteration of the record's clarity (pp. 14-19 *supra*) that Appellants were sincerely and totally surprised at being forced to trial in Pape's absence (PR 88;

157), they submit they were prejudiced thereby because they relied upon him to prove that he made his locations in October, 1950 (PR 111), and the extent and nature of the 1952 assessment work (PR 355-358; 382-396) and to corroborate his proofs of labor, Exhibits F and H (Appendix pp. 22-25), and to refute (PR 109-113) Ward's prejudicial statements (PR 78-81) and such of them as might be put in evidence.

Appellants respectfully submit that the trial Court's abuse of discretion was also arbitrary and capricious in giving credence to Ward's affidavit (PR 78-81) in denying their Motion for Continuance (PR 76-78), and in denying their request for reservation of decision until Pape's evidence could be adduced (PR 95) and in failing to inform Appellants that it had informed Appellee on December 1, 1953, that it would deny Appellants' Motion for Continuance (PR 137) and leaving Appellants to learn thereof on December 8, 1953, from Appellee's counsel (PR 137), and in disregarding Appellants' showing that Pape was more than 100 miles from Juneau, the place of trial, and, certainly so far as Vevelstad and Aurora Nickel Company were concerned, they had not procured his absence (PR 82-88), and in rejecting Pape's deposition on the ground it was taken by Appellee for discovery purposes only (PR 99; also, see: Question 2, Point 5, *infra*, p. 57).

Arbitrary and capricious abuse of discretion is error.

3 *Am. Jur.*, p. 524-5, Sec. 959.

Adcock v. Adcock, 91 NE2d 99.

**PAPE'S DEPOSITION WAS ADMISSIBLE
UPON APPELLANTS' OFFER.**

Question 2: Point 5 (PR 718).

Appellants offered in evidence (PR 340) Pape's deposition taken by Appellee in Seattle in September, 1953 (PR 343-432), which the Court tentatively admitted (PR 342-343), but later rejected on the ground it was taken by Appellee "for discovery purposes only" (PR 99). Appellee, in resisting a continuance, suggested Appellants' use of Pape's deposition (PR 147), and, Appellants contend, did not object, at least not properly, to its admission (PR 340-342).

It was clearly admissible under Rule 26(d)(3)(2) FRPC, i.e.:

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was obtained by the party offering the deposition . . ."

The Court made no finding other than Pape's absence was inexcusable (PR 99). Pape was more than 100 miles distant from Juneau, the place of trial, and outside the United States, nor had Appellants Vevelstad and Aurora Nickel Company procured his absence (PR 82-88). They could not subpoena him under Rule 45(e)(1), FRCP, i.e.:

". . . A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of hearing or trial specified in the subpoena; . . ."

The Court said Pape was a material witness (PR 135-136). It did not say his deposition did not adduce material evidence (PR 99); in fact, it was material, *inter alia*: He worked on Chichagof Nickel Company claims in Bohemia Basin about 3 months in 1931 (PR 346-348), which showed his familiarity with ground and discoveries. Vevelstad said the Chichagof Nickel Company first held these claims from 1925 to 1934 (PR 551). Pape said he went to the upper camp (in Bohemia Basin) on September 25, 1950 (PR 375), returning to the Beach Camp noon October 2, 1950 (PR 376; 354-355), refuting Hildre's first statement that Pape left Bohemia Basin October 1, 1950 (PR 599) and agreeing with Hildre's second statement Pape left Bohemia Basin October 2, 1950 (PR 605). Pape's location notices, Exhibit E (Appendix, pp. 26-59) bear date October 1, 1950. Pape testified to the extent of the 1952 assessment work, including work on trails, which he did (PR 356-358; 381-396) and for 1953 (PR 396-431), refuting Klein's opinion as to the small extent of trail work (PR 686); also (PR 405-414) refuting Harrigan (PR 653-669), and supported his proofs of labor, Exhibits F and H (Appendix, pp. 22-25). His deposition thus also refuted the Court's finding that Appellants' assessment work was done outside the claims purportedly for the benefit of non-contiguous claims (PR 104).

Pape's deposition was admissible under authority of
Moore's Federal Practice, Vol. 4, 1196,

which epitomizes in footnote 14, in the following language:

"The majority opinion indulges in a wholly strained and hampering construction of Rule 26(d)(3). . . .

Professor Moore shows that a party may properly take advantage of clause 2 without necessarily being charged with procuring his own absence. 2 Moore's Federal Practice, 2460-2462, 2492,"

Judge Clark's dissent in

Arnstein v. Porter, 154 F2d 464, 478 (CCA2d 1946).

See also:

Weiss v. Weiner, 10 FRD 387, 389.

Frederick v. Yellow Cab Co., (USCA3d 1952), 200 F2d 483.

Moreover, Appellee had the duty to show that Pape was available.

Seiden v. Concordia Fire Insurance Co., 49 F2d 474 (DCSDNY).

Appellee made no such showing, admitting he had no evidence that Appellants Vevelstad and Aurora Nickel Company had procured Pape's absence, and stipulating that Vevelstad would testify they had not (PR 342).

**APPELLANTS' WITNESS RICHELSEN'S TESTIMONY WAS
COMPETENT, RELEVANT AND MATERIAL.**

Question 3; Point 6 (PR 718).

Frankly Appellants don't know whether they have a ground for Point 6. They thought the Court during Richelsen's testimony (PR 437-463) had stricken much, if

not all, of his testimony; but, the record is indefinite on the subject, simply showing that the Court stated that it doubted the map, Exhibit K, introduced by Richelsen, would have any value (PR 459; 461).

Richelsen said he was a consulting mining engineer with extensive experience with mining claims and their location in Alaska, having been chief engineer, chief geologist, and manager of the Kennecott Copper Company's Alaskan properties (PR 438-439). He prepared Exhibit K, the green outline on which is the approximate location of the ground staked by Appellee, and whose beginning point is Lat. $57^{\circ}57'33''$, Long. $136^{\circ}27'23''$ being obtained from Appellee's Amended Complaint (PR 439; also, PR 54).

The red shading thereon shows Appellants' ground and was platted from the recorded location notices (PR 440) which is approximately correct (PR 460). It shows the conflict between Appellee's and Appellants' claims (PR 440), which had not been shown on Appellee's case in chief.

He prepared the sketch, Exhibit L, admitted without objection (PR 445), taking it (PR 442) from Appellee's Answer to Interrogatory 9, Exhibit B (PR 308), (PR 22-23), showing the discrepancy between claims Yakobi 1 and 2, also Yakobi 11 and 12 (PR 442), with open land between the end lines (PR 444).

He was on Yakobi Island August 5, 1942, when the U. S. Bureau of Mines was doing diamond drilling, the ore being largely confined to Appellants' claims and not disseminated over a vast area, which data he obtained from U. S. Bureau of Mines' drilling records (PR 445-447), also from U. S. Geological Survey Bulletin 931 F,

page 120, of which the Court took judicial notice (PR 462-463).

Appellants submit the map and the sketch, Exhibits K and L, were both admissible and valuable for use as evidence under the rules announced by this Court in

Grant v. Pilgrim, 95 F2d 562, 566, 568, 572.

BOHEMIA BASIN CAMP WAS NOT A NATURAL OBJECT OR PERMANENT MONUMENT UNDER SECTION 47-3-33, ACLA 1949.

Question 4; Point 7 (PR 718).

The Court held that “the claims are described with reference to the Bohemia Basin Camp, which the Court finds refers to the cabin.” (PR 105)

All of Appellee’s 45 claims (PR 119-121), except Pelican 28, are tied in to the Bohemia Basin Camp by their location notices, Exhibits 2, 3, and 4.

Nowhere did Appellee’s case in chief (PR 160-326) identify “the” or any particular cabin inland $2\frac{1}{2}$ to 3 miles from the mouth of Bohemia Creek as being the Bohemia Basin Camp, which Basin Vevelstad said without contradiction was a valley about $\frac{1}{2}$ mile wide, about 8 miles long, cutting Yakobi Island in two (PR 537). U. S. Coast & Geodetic Survey Chart No. 8260, whereof Appellants urge this Honorable Court to take judicial notice, shows that Bohemia Basin extends from the mouth of Bohemia Creek, on Lizianski Straits, back into Yakobi Island. Norppa said they camped at the Bohemia Basin Camp and “This here is the log cabin, and the woodshed over here, and there are other camps over here but the roofs have been caved in and so on, but this is the only

livable camp'' (PR 246) and Flynn said in October and November, 1952, they camped in that same main building on Yakobi 6 (PR 320), without other identification or locus of any particular camp other than to encircle in blue 2 buildings on Exhibit 1, although buildings are also shown on Yakobi 11, and without stating how far apart or how much acreage was occupied by these various ''camps.'' The record doesn't disclose how far apart these ''other camps'' are, but a distance of 1000 feet, or even 200 feet results in great variation in ''tie in'' to a mining claim. The trial Court not only said in respect to Appellee's attack upon Appellants' claims ''The testimony is in irreconcilable conflict on every point'' (PR 100) but also that Appellee's location certificate descriptions were doubtfully sufficient (PR 105). *On rebuttal*—Appellee's witness Goodwin who had never been on but had flown over Yakobi Island said the ''upper camp'' was known as Bohemia Basin Camp (PR 575), and seemingly said, as had Norppa (PR 246), more than one camp was in Bohemia Basin (PR 576). Appellee's witness Hildre said Bohemia Camp was at Bohemia Creek's outlet (PR 595). Vevelstad said the base camp at the beach was known as the Bohemia Basin Camp and that he built all the buildings on the island except one, called an assay office, at the base camp on the beach (PR 523-524). Harold Hofstad testified Bohemia Basin Camp was at the mouth of Bohemia Creek off which upon arrival there on June 5, 1953, a small boat was anchored and where the supplies were kept and the watchman was (PR 474).

The Court found that the evidence was susceptible of only one inference, i.e.: Appellee's claims were not well known (PR 105).

There was no permanent camp inland $2\frac{1}{2}$ to 3 miles from Bohemia Basin's limit at the mouth of Bohemia Creek during that time. A camp signifies a place used or occupied. Tent is not synonymous with camp, although a tent in which one lives or works may be properly called a camp. If Flynn and Norppa used or occupied any particular cabin $2\frac{1}{2}$ to 3 miles inland from Bohemia Basin's limit at the mouth of Bohemia Creek during their some $7\frac{1}{2}$ days stay on Yakobi Island in October and November, 1952, it was only temporary use and occupation, not a permanent monument, and, if it thereby became a camp, it was only temporarily so.

Such buildings with a crew of men living in them as were $2\frac{1}{2}$ to 3 miles inland from Bohemia Basin's limit at the mouth of Bohemia Creek in 1941 and 1942 when the government conducted its drilling operations may have been a camp, but they were no longer a camp when use and occupation of them ceased.

U. S. Coast & Geodetic Survey Chart No. 8260 is for the use of mariners navigating the adjacent waters. It designates Bohemia Basin as commencing at the mouth of Bohemia Creek, not as commencing $2\frac{1}{2}$ to 3 miles inland. There is the place used and known by fishermen under the local name of Bohemia Basin Camp (PR 524).

Appellants submit that a valley about $\frac{1}{2}$ mile wide and about 8 miles long, cutting Yakobi Island in two (PR 537) is too indefinite a tie under the rule announced by this Court in

Riley Investment Co. v. Sakow, 98 F2d 8, 11, and that the trial Court under the evidence could not infer that any particular cabin $2\frac{1}{2}$ to 3 miles inland from

Bohemia Basin's limit at the mouth of Bohemia Creek was intended by the term "Bohemia Basin Camp" in Appellee's location notices, Exhibits 2, 3, and 4, and constituted a permanent monument or natural object under Sec. 47-3-33, ACLA 1949 (Appendix, pp. 7-8).

Appellants tied their locations through Hope No. 4 (PR 455) Exhibit E, (Appendix, pp. 40-41) to the tunnel, which is a permanent and easily discernible monument and object (Picture, Exhibit O).

**APPELLANTS' MOTION FOR NEW TRIAL
SHOULD HAVE BEEN ALLOWED.**

Question 5; Points 8 and 9 (PR 718-719).

Appellants' Motion for New Trial (PR 107-109) was supported by Pape's affidavit (PR 109-112) stating he located his claims in October, 1950, left Bohemia Basin on October 2, 1950, was anxious to be a witness at the trial, but was kept from it by his government employment, leaving for Korea on November 26, 1953, and refuted (PR 109-112) Ward's affidavit (PR 78-81), which was Appellee's only verified evidence opposing Appellants' motion for continuance of trial (PR 76-78), and Brown's affidavit (PR 113-114), wherein he corroborated Pape's deposition, which the Court rejected (PR 99), that he left Yakobi Island around noon October 2, 1950 (PR 355; 376), and Breseman's (PR 114) that he worked with Pape from June 6 to 11, 1953, on the Hope and Rita claims about 2½ miles up Bohemia Valley from the main basin camp on Lisianski Strait, and saw Johnson

and O'Donnell only once during that time, and Breseman's (PR 116-118), which was newly discovered evidence, as stated therein (PR 116), and said he had worked for Appellee and with Stahl in Bohemia Basin in November and December, 1953, and had seen no indications of any blazed boundaries, monuments, or stakes of Appellee's claims, while checking the Hope claims boundaries which were blazed and corners and discovery posts in place and visible, and he and Stahl walked a distance of some 50 to 200 yards, after checking the Hope claims, before coming to any of Appellee's claims, and Stahl told him that he, Stahl, had relocated and restaked the key claims so he could file location notices thereof should the Court hold both Appellee's and Appellants' claims were invalid, and Stahl also told him he had never seen any claims better marked than Pape's claims (PR 116-118). Johnson had said Stahl had measured the greatest share of the claims, and Breseman helped Stahl, and Stahl and Breseman had gone over some of the lines as a separate party (PR 200-201). Appellee did not call Stahl as a witness.

No opposing affidavits were filed.

Breseman's affidavit (PR 116-118) was newly discovered evidence competent and relevant to and supported the issue of Appellants' Hope claims boundaries having been properly blazed with corners and discovery posts in place and that Appellee's claims did not have blazed boundaries, monuments or stakes.

Appellants specifically called it to the Court's attention as newly discovered evidence in their argument (PR 711) on their Motion for New Trial (PR 107-109).

Such Breseman testimony might well have changed the result of the trial.

Tracy v. Terminal R., etc., 170 F2d 635 (CAMo.);
Murdock v. U. S., 160 F2d 358 (CCA, Ark.).

It was not merely cumulative, nor such as to do no more than discredit, contradict, or impeach a witness.

The Court also ignored Pape's affidavit (PR 109-118), despite the facts and situation before the Court (pp. 14-19, *supra*), when it denied (PR 88; 157) Appellants' Motion for Continuance of Trial (PR 76-78), ignored Appellants' request to reserve decision until Pape's evidence could be adduced (PR 95), and rejected Pape's deposition (PR 99).

Appellants, therefore, respectfully submit that the Court abused its discretion in overruling (PR 118) their Motion for New Trial (PR 107-109), in the face of exceptional circumstances calling for a new trial.

**APPELLANTS WERE ENTITLED TO JUDGMENT ON THEIR
 COMPULSORY COUNTERCLAIM.**

Question 6; Point 10 (PR 719)

Appellants in their answer set forth a counterclaim under Rule 8(a) (Appendix, p. 12), which they therein denominated (PR 73-74) as such under Rule 7(a) (Appendix, p. 12), which Rule required a reply thereto.

Appellee served and filed no Reply, nor any motion against it.

Appellants' Counterclaim is a Compulsory Counterclaim under Rule 13(a) (Appendix, p. 13) and arose

out of the transaction or occurrence that is the subject matter of Appellee's claim (Amended Complaint, PR 53-63), and had they not pleaded it herein they would have been precluded from doing so in an independent action.

Lesnik v. Public Industrials Corporation, 144 F2d 968 (CCA NY 1944);

Penn. R. Co. v. Musante-Hilllips, Inc., 42 F.Supp. 340 (DC Cal. 1941).

Appellants submit that their Counterclaim denominated as such required a Reply Rule 7(a), *supra*, or else stands admitted under Rule 8(d) (Appendix, p. 12).

U. S. v. Hole, 38 F.Supp. 600 (DC Mont. 1941);

Porter v. Theo J. Ely Mfg. Co., 5 FRD 317, (DC Pa. 1946);

Sun-Maid, etc., Assn. v. Neustadter Bros., 115 F2d 126, 127 (CCA Cal.);

Peters & Russell v. Dorfman, 188 F2d 711, 713, (USCA 7).

The trial Court seemingly would have so held had he not criticized the form of the plea (PR 105). Appellants submit that their Counterclaim was well pleaded, and that Rule 9(g), i.e.: "Special damage. When items of special damage are claimed, they shall be specifically stated," required them to plead their special damages, and that under Rule 10(c), i.e.: "Adoption by Reference. Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion . . .", they properly incorporated therein by reference (PR 73) the allegations in their Third Defense (PR 68-73) which were necessary

allegations showing the foundation of their claim to special and exemplary damages, and that their Counterclaim (PR 73-74), assuming without conceding that it was prolix or contained unnecessary allegations, should have been construed in the spirit of Rule 8(f), i.e.: "Construction of pleadings. All pleadings shall be so construed as to do substantial justice," instead of being entirely discarded by the Court of its own volition.

Hollander v. Davis, 120 F2d 131 (CCA, Fla);

Gribble v. Ditto, 119 F2d 278 (CCA, NY);

Bachman v. Seaboard Air Lines R. Co., 80 F.Supp. 976 (DC, SC);

Perry v. Creech Coal Co., 55 F.Supp. 998 (DC, Ky).

Appellants proved their damages by Vevelstad (PR 544-550) and that he alone would have received annually around \$8,000,000 on royalties plus 25% of the profits, and that he had had an engineer on the ground representing buyers (PR 573). Appellee adduced no evidence whatsoever to rebut Vevelstad's evidence in that respect.

APPELLEE'S CLAIMS WERE NOT LOCATED NOR LOCATION CERTIFICATES THEREOF RECORDED AS REQUIRED BY UNITED STATES AND/OR ALASKAN MINING LAWS.

Question 7; Point 11 (PR 719).

Appellee's only witnesses to actually locating his claims were himself (PR 265-326) and Norppa (PR 211-265).

Appellee's counsel admitted that they used a rather peculiar method in staking the claims (PR 214). Norppa didn't make any discoveries and put in no discovery

posts (PR 226-227). Flynn said he made a discovery on each claim (PR 282), but he didn't take samples from each claim, only from Bureau of Mines' pits (PR 322). Neither testified the ore on any particular claim was such as to justify a reasonable man to mine it. Richelsen said government data showed the ore largely confined to Appellants' claims, not disseminated over a vast area (pp. 60-61, *supra*). Nor did they testify which of their claims the ground whereof the government had diamond drilled, nor that they adopted the previous discoveries of any one. Norppa did not put in all corner monuments on any one of the claims (PR 248). Appellee didn't go around all the boundaries of any one claim prior to November or December, 1953 (PR 324). Flynn said his discovery posts and discovery notices were on the end lines of his various claims (PR 281).

In running the lines Flynn and Norppa started at the same spot, taking off in different directions. Flynn going along the end lines of Yakobi 1 and 2, putting in monuments as he went along (PR 283). The first day Norppa ran the southwest line from Betty 1 to Portia 3 (PR 216); October 27 they worked on the Mayflower Group; October 28 Norppa ran the end lines of 10 claims (PR 218); October 30 the north line of Portia 8 and 9 and end lines of Portia 9, 6, Yakobi 12, 10, 8, and up, he guessed, to Betty 5 center line (PR 220). October 31 Norppa put in the location notices on the line between Betty 1, 2, 7, 8, Yakobi 1, 2, 3, 4, 5, 6, Portia 3, 4, 7 (PR 221). They had a plan for staking all made out before they started (PR 224; 277). Norppa didn't know how the veins run. He had no idea (PR 230). Norppa didn't testify to the Peli-

can group. Flynn's only testimony in regard to them is "We ran the lines around those to complete their staking. We put the corner, end, and discovery posts on all those claims" (PR 291-292). and that he put the corner posts in on Pelican 15, 16, and the other two, and Norppa on Pelican 28, 29, 30 (PR 300). The Court limited Appellants' cross examination to Flynn's stating he put in all notices which Norppa didn't (PR 300).

Each of the location notices of Appellee's 45 claims state, for example Pelican 26, "this claim extends 1500 feet southeast and 0.0 feet from the discovery monument on which this notice is posted, along the center line of said claim," plainly indicating that discovery, if any, was on the end line not within each claim, assuming that such description intelligibly answers the question: Does the claim extend "1500 feet southeast" or "0.0 feet" from the discovery monument. These location notices, Exhibits 2, 3 and 4, over Appellants' objection on that very ground (PR 287), were admitted (PR 288, 293). Appellee said they were carbon copies of those posted on the ground (PR 286). He offered in evidence no others as location certificates and the Court termed them "location certificates" (PR 105); hence, appellants submit their insufficiency must be construed in the light of both Sections 47-3-31 and 47-3-33, ACLA 1949 (Appendix, pp. 7-8). As location notices they don't state either the number of feet in length along the vein each way from the point of discovery or the width on each side of the center of the lode or vein, but instead say they include 300 feet of surface ground on each side of the claim's center line without stating that the claim's center line

is on the lode or vein, and as location certificates they don't give the date of posting the location notice or tie in to a permanent monument or natural object. The Court said Appellee's claims were not well known enough to constitute permanent monuments (PR 105). Appellee said he posted all his location notices and prepared them in the evenings after coming in from work (PR 285; 301), so inferentially they were not all posted on the same day or on the date of location stated in them. Appellee said he and Norppa posted them on October 30 (PR 315). In May, 1953, Appellee moved Portia 5 discovery post 70 feet southwest and Portia 6's 60 feet northeast (PR 309-311). Discovery on Yakobi 11 was about 300 feet southwest of the northeast center end post (PR 305); on Yakobi 12 about 40 feet northeast of the southeast center end post (PR 306); discovery on Yakobi 9 was some 30 or 40 feet from the end line (PR 302-303); on Yakobi 1, 2, 3, and 4 discovery was 5 or 10 feet from center end line (PR 301-302); Yakobi 10, discovery was 20 feet northeast of the southwest center end post (PR 304). These 8 claims were among those whose title the Court quieted in Appellee (PR 119-120). Their location notices did not comply with Sec. 47-3-31, *supra*, by stating the distance each way long the center of the claim, let alone the vein, from the discovery point. Portia 5 and 6 were also two of those claims (PR 120). Inasmuch as Appellee moved their discovery posts in May, 1953, evidently their location notices likewise did not comply with Sec. 47-3-31. Nor could those 10 location notices have complied with Sec. 47-3-33 when recorded, as the Court found (PR 105), as location certificates because, instead of being 1500 feet in length, as stated in them, if the claimed

situation on the ground prevailed (as the Court held, PR 106), inasmuch as in each instance they said they ran 1500 feet in a designated compass direction from the discovery monument, they actually were short anywhere from 5 to 300 feet less than 1500 feet. Apparently some such discrepancy existed in all of them because Appellee said "They vary, most of them 5 or 10 or 15 feet, and in 6 instances, I think it is, they are over 30 feet" (PR 303), and "a few of them are singles, but most of them are in pairs" (PR 317). The actual situation was illustrated by Richelsen through his sketch, Exhibit L (PR 441-445), leaving open public domain between Yakobi 11 and 12 of some 340 feet. Vevelstad said he found 8 of Appellee's claims, 2 going over a precipice into a 400 feet deep canyon and 6 having a perimeter of 1400 feet which he measured with a line (PR 539, 540; 526-527), without adjoining or parallel lines, and that they were staggered locations. Harold Hofstad said within a distance of 2000 feet they found four notices, double notices (PR 489). Discarding Vevelstad, Hofstad, and Richelsen's testimony, clearly at least 10 of Appellee's claims either were so located on the ground as to leave open public domain between them which the trial Court disregarded or else their location notices did not comply with Sec. 47-3-31, *supra*.

Flynn and Norppa were both experienced mining engineers, Flynn with staking mining claims in Canada and the United States, Norppa in Canada (PR 265-266; 211-212; 226). They are not entitled to liberal construction of their location notices as though they were ignorant prospectors or inexperienced miners. Their failure in

their notices to state the distance along the vein and the width each way therefrom and the date of location is material because all of Appellants' location notices and certificates of location, except that of Svere 3, as well as Pape's proof of labor for 1952 were recorded in the Sitka Recording Precinct prior to their locating Appellee's claims in October and November, 1952.

Jualpa Co. v. Thorndyke, 4 A. 207.

Nor is Yakobi Island a new mining district, Vevelstad having located its ore bodies in 1920 (PR 523), which instant facts, Appellants submit, make inapplicable the principle stated by this Court in

Walton v. Wild Goose Mining Co., 123 F. 209.

Those recordations were constructive notice to Appellee of those location notices, certificates of location, and proof of labor.

Meydenbauer v. Stevens, 78 F. 787.

Appellants specifically alleged that prior recording (PR 70), also Appellee's knowledge of Appellants' prior ownership and possession (PR 73), Appellee's witness Harriگان admitted knowledge of them in May, 1953 (PR 654-655). Nonetheless, the trial Court held Appellants failed to give Appellee prior actual knowledge (PR 103).

Moreover, as stated, the trial Court held Appellee's location notices were certificates of location; hence, they are not entitled to the great indulgences with which inaccuracies and markings in initial notices are treated.

Vedin v. McConnell, 22 F2d 735 (CCA 9).

Appellee had 4 maps of his claims, none of which agree: A map, Exhibit A attached to and incorporated in his

Amended Complaint (PR 58) and a part thereof under Rule 10(c) (Appendix, p. 83), which is now detached from the pleading but should not be confused with Appellants' Exhibit A; Exhibit 1, which does not show Pelican 15, 16, 25, 26, 28, 29 and 30 (PR 291) but which are shown on the map attached to the Amended Complaint (PR 298); Plate 20, U.S.G.S. Bulletin 931F, Exhibit A, which Appellee claimed he used in laying out his claims (PR 278); Exhibit C, a tracing which Appellee filed for record when recording his location notices (PR 309). Space is too limited herein to discuss the variances in these maps. But, for instance, the only straight line on Exhibit 1 runs either 33° North or 33° from true north. If the arrow thereon indicates magnetic north, that line is $63^{\circ} 21'$ from true north. On the map attached to the amended complaint seemingly this same line is the south line of a block and runs 23° west of true north. Exhibit C names the lake north of Takanis Lake as "Flynn" lake, Exhibit 1, as "Lynn Lake." Appellee's Exhibit 1 was admitted over Appellants' objection as too remote, upon Appellee's assurance he would connect it up (PR 165), which he did not do. Appellee didn't complete the staking of the Takanis group (PR 288-289), to which are tied his claims in his Complaint (PR 4) and Amended Complaint (PR 54), and the map, Exhibit A attached to and made a part of his Amended Complaint (PR 58).

All of Appellee's 45 claims (PR 119-121), except Pelican 28, purportedly tie in to Bohemia Basin Camp, which is not a natural object or permanent monument (See Q. 4, Point 7, pp. 61-64 *supra*).

Stahl, who measured the greatest share of the claims, and who with Breseman went over some of the lines as a separate party, was not called as a witness, but Exhibit 1 was offered through Johnson who said he had not checked out all of Appellee's claims (PR 200-201).

Appellants submit that the rule, applied by the trial Court (PR 106), that marks on the ground govern, after finding: "The descriptions given in the location certificates of Appellee are such as to make it doubtful whether they are sufficient" (PR 105) does not permit deception of the adverse claimant, and that no competent evidence was adduced of Appellee's claim markings on the ground, and none whatever of Pelican 15, 16, 25, 26, 28, 30, and that Appellee is bound by the descriptions in his Amended Complaint and the map attached to and made a part of it (PR 54-58) and in his location notices and Exhibit C which he filed with them with the Sitka Recorder, and that he made no discoveries, and adopted no known discoveries, and did not locate his claims along their veins or lodes, if any, and did not mark the boundaries of his claims or put his discovery post at or adjacent to the place of discovery, but put them on the end lines, whereas a discovery must be within a claim, and recorded no certificates of location, all as required by Sec. 47-3-31 and Sec. 47-3-33, *supra*.

PAPE'S PROOFS OF LABOR WERE PRIMA FACIE EVIDENCE OF THE PERFORMANCE OF THE WORK AND MAKING THE IMPROVEMENTS THEREIN STATED.

Question 8; Point 12 (PR 719).

Appellants' verified, recorded proofs of labor for the assessment years ending noon July 1, 1952, and July 1, 1953, respectively, were admitted, over Appellee's objection that they were immaterial (PR 433), as Exhibits F (PR 434) and H (PR 435) (Appendix, pp. 22-25).

They were not contradicted, other than possibly by Klein's negative testimony that in his opinion only 6 man 8 hour days labor had been done upon the trail (PR 687-689).

Appellants submit that obliterations of assessment work, without the performer's fault or act, are no more to be charged against the performer than removal of stakes, monuments or notices without the locator's act or fault.

Moore v. Steelsmith, 1 Alaska 121.

These proofs were corroborated by Pape's deposition (pp. 27-28 supra), which the trial Court rejected (PR 99).

Section 47-3-55, ACLA 1949 (Appendix, pp. 10-11), provides that such proofs, when recorded, are prima facie evidence of the performance of the work and making of the improvements therein stated. These proofs were sufficient; hence, Appellee had the burden of disproving them.

Babcock v. O'Lanagan, 7 Alaska 171.

They showed labor and time spent each year on the trail, which Vevelstad said was the only feasible trail (PR 569) and which Appellee's counsel Ward said he had traveled 5 times (PR 695).

Practically every witness had something to say about using the trail, showing the necessity of its use to go inland $2\frac{1}{2}$ to 3 miles into Bohemia Basin from its limit on the beach at Bohemia Creek's mouth.

All the decisions hold that trail work is good assessment work.

Without conceding that any of Appellants' claims are noncontiguous other than Beach 1, 2, and 3, through which the trail ran, and possibly Takanis 1, or that the work was done outside them, they submit that work on a trail affording access to claims is good annual labor, and that those proofs as well as Appellants' witnesses Hofstads, Jones, and Vevelstad proved good and sufficient assessment work on the Rita and Hope group of claims, and that it also benefited the Svere group and Takanis 1 claims.

The trial Court not only ignored the prima facie evidence value of these proofs of labor but placed the burden upon Appellants to prove that the work benefited all their claims (PR 104), instead of placing the burden upon Appellee to disprove those proofs of labor, and disregarded Appellants' positive evidence.

Lowe v. U.S. Smelting, Refining & Mining Co., 175 F2d 486 (USCA 9).

**APPELLEE SHOULD HAVE FILED A REPLY BRIEF
TO APPELLANTS' TRIAL BRIEF.**

Question 9; Point 13 (PR 13).

Appellants called the trial Court's attention in their Motion for New Trial (PR 108) to Appellee's failure to file a reply brief refuting the law and facts stated in their trial brief. They concede they have found no authorities on the effect of such delinquency or the duty of one litigant to answer or reply to the other litigant's brief.

Appellee neither replied to, moved against, nor adduced evidence to disprove Appellants' Compulsory Counterclaim (PR 73-74), the burden of proof whereof they admit was upon them. Their Third Defense (PR 68-73) was also an affirmative plea for relief, and in their trial Brief (PR 93-97), even though hesitantly, they attacked the credibility of Appellee's counsel Ward, whose affidavit (PR 78-S1) was Appellee's only sworn evidence in opposing Appellants' Motion for a Continuance of Trial (PR 76-78; 82-88).

Appellants submit that Appellee's failure to answer or reply to their brief constitutes a waiver, even an admission, of Appellants' argument on those affirmative issues and charges. The trial Court found "the evidence is in irreconcilable conflict on every point" (PR 100), speaking of Appellee's contentions (PR 99), and "the descriptions given in Appellee's location certificates are such as to make it doubtful whether they are sufficient" (PR 105), but nonetheless held for Appellee (PR 106).

THE BURDEN SHOULD HAVE BEEN PLACED UPON APPELLEE TO PROVE HIS CLAIM FOR RELIEF AND TO RELY UPON THE STRENGTH OF HIS OWN TITLE IN PROOF THEREOF.

Question 10; Points 14 and 15 (PR 719).

Appellants believe these two points can be logically discussed jointly. They called attention to both of them in their Motion for New Trial (PR 109). They argued both of them in the hearing on that Motion (PR 703).

Although Appellee was the plaintiff, the learned trial Court in its Opinion (PR 97-106), instead of first determining the sufficiency of Appellee's title, although finding "the testimony is in irreconcilable conflict on every point" in respect to Appellee's contentions (PR 99-100), held (PR 100-104) Appellants' locations were invalid, then said the next question for determination is the validity of Appellee's 45 claims (PR 104), whereas Appellants submit the first question was the validity of Appellee's claims inasmuch as he was the plaintiff. Thereupon although finding "the descriptions given in Appellee's location certificates are such as to make it doubtful whether they are sufficient" (PR 105), the Court held that Appellee was entitled to have title to his 45 claims quieted (PR 105-106). Appellants realize this reverse order of determination didn't effect the result as reflected by the judgment (PR 119-122), but submit it clearly shows the trial Court erroneously either cast the burden upon Appellants or thought they were the plaintiffs.

In his case in chief (PR 160-326) Appellee adduced no evidence of the extent of conflict between his and Appellants' claims. The Court sustained Appellee's objection on the ground that it was improper cross examination

when Appellants sought to elicit that information from Johnson (PR 177-180), Appellee's counsel stating "I didn't ask a single question in respect to Pape's locations or even if he knew Pape" (PR 177-180). The particular purported map, Exhibit 7, was later admitted on Appellee's rebuttal (PR 619). The Court volunteered that there was only one camp in Bohemia Basin (PR 246), although Norppa said there were several camps (PR 246), and several witnesses referred to the upper and lower camp, and Vevelstad, Harold Hofstad, and Hildre referred to the Bohemia Basin Camp as being at Bohemia Creek's mouth.

The trial Court originally indicated he thought the burden was on Appellants to show how their claims conflicted with Appellee's when it said: "Why not wait until the defense is in, and then you can rebut it. There is no use anticipating the defense" (PR 289), also when it said: "I have been wondering all along how it could be material" that Appellee's discoveries were not at the places named in his location notices (PR 305).

Appellee put in Exhibit 1 by Johnson (PR 166), but he admitted that Stahl (who was not called as a witness) measured the greatest share of the claims and with Breseman had gone over some of the lines as a separate party and he, Johnson, had not checked all the claims (PR 200-201). Furthermore, Pelican 15, 16, 25, 26, 28 and 30 were not shown thereon. Appellants submit that Exhibit 1 did not prove Appellee's title or shift the burden of proof to them. See argument Question 7 (pp. 68-75 *supra*).

When Appellee closed his case in chief, Appellants moved for dismissal under Rule 41(b) (Appendix, pp. 15-16) which the Court denied (PR 326-340), notwithstanding it had previously indicated, as stated, that Appellee had the burden to prove wherein Appellants wrongfully claimed any of Appellee's claims (PR 180), but which proof Appellee did not make. Whatever proof Appellee made thereof, he made on Rebuttal, insufficiently, too, Appellants contend.

This suit was brought by Appellee to quiet title to 102 mining claims under Section 56-1-91, ACLA 1949 (p. 1, *supra*).

Appellee could succeed only upon the strength of his own title.

Ripinski v. Hinchman (USCA 9) 181 F.786, 3 AFR 496.

Patton on Titles announces the same rule: "Plaintiff can recover only on the strength of his own title." p. 917.

Anderson v. Anvil Hydraulic Co., 3 Alaska 496.

The burden of proof was on Appellee under the well known rule, i.e.:

"The complainant in any action to quiet title, to remove a cloud thereon, or to determine an adverse claim has the burden of proof as to all issues arising upon essential allegations of the complaint. He must prove title in himself if the answer denies his title or *if the defendant claims title adversely*. He must also assume the burden of showing compliance with conditions precedent to his right to relief." (emphasis supplied)

Quieting Title, 44 Am. Jur., Sec. 83, pp. 67-68.

“In an action to quiet title or remove a cloud thereon the plaintiff has the burden of proving the facts alleged on which his right to judgment is based.

“The burden is on the plaintiff to establish that he has a perfect or equitable title *regardless of whether the defendant's title is valid or invalid*, and, when properly in issue under the pleadings, the plaintiff has the burden of showing that his title or right is superior to that of the defendant.” (emphasis supplied).

Quieting Title, 74 CJS Sec. 76(B)(1)(a) and (b), pp. 118-119.

Appellee did not sustain that burden on his case in chief, and Appellants' Motion to Dismiss under Rule 41(b), *supra*, should have been granted; in fact, Appellee did not sustain that burden throughout the entire trial, and his action should have been dismissed.

APPELLEE ON HIS CASE IN CHIEF SHOULD HAVE BEEN REQUIRED TO PROVE THE DEFINITE EXTENT, IF ANY, BETWEEN HIS AND APPELLANTS' CLAIMS.

Question 11; Point 16 (PR 720).

Appellants presented this point to the trial Court in their argument (PR 712) on their Motion for New Trial, and had tried to get at the point in cross examining Johnson but were overruled (PR 177-180).

They urge that such conflict necessarily is an issue made by Appellee's pleadings and that he had the burden to show actual injury which could only be done on his case in chief by showing the extent of conflict between

Appellants' 27 claims and the 102 claims he alleged to have located in both his Complaint (PR 3-10) and Amended Complaint (PR 53-61).

"Ordinarily, one must wait until his rights have been actually interfered with before he can, by suit to quiet title, implead another from whom he anticipates an injury."

Quieting Title, 44 Am. Jur., p. 31, Sec. 38.

"Plaintiff's proofs must clearly show that the claim set up by defendant is invalid, and that it constitutes a cloud on plaintiff's title."

Quieting Title, 74 CJS, p. 128, Sec. 81.

Neither did Appellee by competent evidence prove that conflict on his rebuttal.

Appellants submit that the principles are applicable in Question 10 (pp. 79-82, *supra*).

APPELLEE DISQUALIFIED HIMSELF TO LOCATE MINING CLAIMS IN ALASKA WHEN HE VOLUNTARILY STATED HE WAS A CANADIAN CITIZEN.

Question 12; Point 17 (PR 720).

Appellants did not attack Appellee's citizenship. Appellee himself on direct examination in chief said he was a Canadian citizen in response to a question put by his own counsel, not by Appellants' counsel (PR 265).

Appellants are familiar with the rule in *McKinley Creek Mining Company v. Alaska M. Co.*, 183 U.S. 563, 571, but reiterate they did not attack Appellee's citizenship. For unknown reasons he himself put in the record his Canadian citizenship.

Sec. 47-3-9, ACLA 1949 (p. 11, Appendix) according reciprocal mining rights to native born Canadian citizens has never been put in effect for the reasons stated in U. S. Department of Interior Circular No. 430, United States Mining Laws (Appendix, p. 11). Moreover, Appellee did not state he was a native born Canadian, but simply a Canadian citizen.

Sec. 47-3—1, *ibid.* (Appendix, p. 1), which was extended to Alaska by Sec. 47—3-21, *ibid.* (Appendix, pp. 1-3), provides that all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law. Appellee did not testify that he had declared his intention to become a United States citizen.

Appellee thus voluntarily admitted that he was disqualified to locate mining claims in Alaska.

Appellants suggest that this Court in

Vedin v. McConnell, 22 F2d 753, 758,

clearly indicated that had Vedin still remained an unpardoned, imprisoned felon, his location would be void, not simply voidable. Likewise, here, had Appellee testified that he had declared his intention to or had become a United States citizen subsequent to his making his locations in October and November, 1952, it would have cured his disqualification; but, not having done so, and his Canadian citizenship having been adduced by himself, not by Appellants, his locations were void, not voidable.

Appellants raised this point on argument (PR 327-329) in support of their motion to dismiss under Rule 41(b), FRCP (Appendix, pp. 15-16), also, on argument (PR 703) of their Motion for New Trial.

**THE JUDGMENT WAS CONTRARY TO THE LAW AND TO THE
PREPONDERANCE OF EVIDENCE.**

Question 13; Point 18 (PR 720).

Appellants raised this point on their Motion for New Trial (PR 109). Without reiteration, they submit that this point is supported by all their argument and evidentiary facts discussed in Questions 1 to 10, *supra*.

Wherefore, Appellants urge that the trial Court's judgment of April 24, 1954, should be set aside and reversed, Appellee's action dismissed, and the trial Court directed to enter judgment for damages against Appellee in accordance with their Counterclaim (PR 73-75).

Dated, Juneau, Alaska,

November 12, 1954.

R. E. ROBERTSON,

ROBERTSON, MONAGLE & EASTAUGH,

Attorneys for Appellants.

(Appendix Follows.)



Appendix.



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Appendix

United States and Territorial Mining Laws, quoted from Alaska Compiled Laws Annotated, 1949.

“§ 47-3-1. Deposits and lands open to exploration, occupation and purchase: Regulations: Local customs and rules. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (41 Stat 437; CLA 1933, § 322; 30 USC § 22.)”

“§ 47-3-21. Extension of United States laws: Lands below line of high tide or high-water mark subject to exploration: Rules and regulations: Exclusive permits: Right to dump tailings: Pumping from sea: Roadway: Title: Termination of rights by state. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: Provided, That, subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, and to the laws for the protection of fisheries, and subject also to such general rules and regulations as the Secretary of the Interior may prescribe for the preservation of order and the prevention of injury to the fisheries, all land below the line of ordinary high tide on tidal

waters and all land below the line of ordinary high-water mark on nontidal water navigable in fact, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: Provided further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation, or company to excavate or mine under any of said waters, and if such exclusive permit has been granted it is hereby revoked and declared null and void. The rules and regulations prescribed by the Secretary of the Interior under this section shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation or impair the fisheries, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898 (48 USC §359; § 47-2-2 herein), entitled 'An Act extending the homestead laws and providing for right-of-way for railroads in the District of Alaska, and for other purposes,' shall not apply to mineral lands or town sites. No person shall acquire by virtue of this section any title to any land below the line of ordinary high tide or the line of ordinary high-water mark, as the case may be, of the waters described in this section. Any rights or privi-

leges acquired hereunder with respect to mining operations in land, title to which is transferred to a future State upon its admission to the Union and which is situated within its boundaries, shall be terminable by such State, and the said mining operations shall be subject to the laws of such State. (31 Stat 329; CLA 1933, § 321; am 52 Stat 588; 61 Stat 916; 48 USC § 381.)”

“§ 47-3-22. Length of claims along veins or lodes: Location not to be made until discovery of vein or lode: Width at surface: End lines. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitations necessary. The end lines of each claim shall be parallel to each other. (RS § 2320; CLA 1933, § 323; 30 USC § 23.)”

“§ 47-3-23. Locator’s exclusive rights of possession and enjoyment: Extralateral rights: Entry upon surface of claim of another. The locators of all min-

ing locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. (RS § 2322; CLA 1933, §326; 30 USC § 26.)”

“§ 47-3-25. Regulations by miners of district: Subject matter: Reference to natural objects or permanent monuments: Records of claims: Annual labor or improvements: Amount: Claims in common: Relocation: Resumption of work: Failure of coowners to contribute proportion: Commencement of period: Expenditures on tunnels. The miners of each mining

district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, \$10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published

nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. (RS § 2324; 18 Stat 315; 21 Stat 61; 42 Stat 186; CLA 1933, §§ 328-331; 30 USC § 28.)"

"§ 47-3-30. Manner of locating claims: Failure to comply with act. Any person who discovers upon the public domain in Alaska any lode or vein of rock in place, or any placer deposit which is open to location under the Mining Laws of the United States, may locate a lode mining claim or placer mining claim thereon by posting a notice of location and by marking the boundaries as herein provided. Any attempted location of a mining claim that does not fully comply

with the provisions of this Act (§§ 47-3-30—47-3-34, 47-3-51, 47-3-53, 47-3-55—47-3-57 herein) shall be null and void. (L 1933, ch 83, § 1, p 159; CLA 1933, § 354.)”

“§ 47-3-31. Designation of location of claim: Lode claims: Posting notice: Contents: Monuments: Marking boundary lines: Witness monuments. The discoverer of a lode claim shall designate the location as follows:

(1) By posting on the surface at or adjacent to the point of discovery a plain sign or notice containing:

- (a) The name of the lode claim;
- (b) The name of the locator or locators;
- (c) The date of the location;

(d) The number of feet in length claimed along the vein each way from the point of discovery, and the width on each side of the center of such lode or vein, and

(2) By erecting on the vein at the center of each end line and at each corner or angle of the claim substantial monuments of stone or setting posts, not less than three feet in height nor less than three inches in diameter hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines, and by cutting out, blazing or marking the boundary lines so that they can be readily traced. Where it is impracticable to place a monument in its true position, a witness monument shall be erected and marked so as to indicate the true position of the corner or angle. (L 1933, ch 83, § 2, p 160; CLA 1933, § 355.)”

“§ 47-3-33. Certificate of location: Recordation: Time for: Contents: Failure to record: Effect: Com-

pliance after ninety days. The locator or locators of any lode claim or placer claim shall within ninety (90) days after the date of posting the notice of location on the claim, cause such claim to be recorded by filing with the Recorder of the Recording District in which the claim is located, a Certificate of Location which shall contain:

- (a) The name or number of the claim;
- (b) The number of feet in length and width of the claim;
- (c) The date of discovering and of posting the notice of location;
- (d) The name of the locator or locators;
- (e) A description of the claim with such reference to some natural object or permanent monument that an intelligent person, with a knowledge of the prominent natural objects and permanent monument in the vicinity, could identify the claim.

Failure to file for record the Certificate of Location, within the ninety (90) days as herein provided, shall constitute an abandonment of the claim and the ground shall be open to location. Provided, however, That full compliance with the provisions of this Section, after the ninety (90) day period has elapsed but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator. (L 1933, ch 83, § 4, p 161; CLA 1933, § 357.)”

“§ 47-3-34. Amended locations: Amendment of notices and change of locations: Filing amended certificate of location. Notices may be amended at any time and monuments changed to correspond with the amended location but no change shall be made which will interfere with the rights of others. Whenever

monuments are changed or an error has been made in the notice or in the Certificate of Location, an amended Certificate of Location shall be filed for record in like manner and with like effect as the original Certificate. (L 1933, ch 83, § 5, p 162; CLA 1933, § 358.)”

“§ 47-3-51. Requirement of performance: Forfeiture for noncompliance: Suspension of requirement. During each year beginning at noon on the first (1st) day of July, and until patent has been issued therefor, annual labor shall be performed or improvements made on, or for the benefit or development of each mining claim in the Territory of Alaska to the extent required by the laws of the United States applicable to Alaska. Upon failure of the owner of any mining claim to perform the annual labor or make the improvements required by the laws of the United States such claim shall become forfeited and open to location by others as if no location of the same had ever been made; provided, that whenever the general laws of the United States requiring annual labor upon mining claims in Alaska are suspended, the laws of Alaska requiring annual labor upon mining claims shall likewise be suspended upon the same terms and conditions. (L 1933, ch 83, §6, p 162; CLA 1933, §359; am L 1941, ch 23, § 1, p 61.)”

“§ 47-3-53. Affidavit: Time for filing: Contents. Within ninety (90) days after the first (1st) day of July of each year the owner of such mining claim, or some other person having knowledge of the facts, shall make and file for record with the Recorder for the District in which the claim is located, an affidavit showing the performance of such labor or the making of improvements. The affidavit shall contain:

(a) The name or number of the mining claim and where situated;

(b) The number of day's work done and the character and value of the improvements made;

(c) The date of the performance of such labor and of the making of improvements;

(d) At whose instance the work was done of the improvements made;

(e) The actual amount paid for such work and improvements, and by whom paid, when the work was not done by the owner or his lessee. (L 1933, ch 83, § 7, p 162; CLA 1933, § 360.)"

"§ 47-3-55. Effect of recording: Burden of proof where affidavit not filed in time. The affidavit when recorded as provided in this Act (§§ 47-3-30—47-3-34, 47-3-51, 47-3-53, 47-3-55—47-3-57 herein) shall be prima facie evidence of the performance of the work or of making the improvements therein stated, but if such affidavit be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such work or the making of such improvement. (L 1933, ch 83, § 8, p 163; CLA 1933, § 360.)"

Quoted from Title 30 USCA, Section 28a, 1953 Cumulative Annual Pocket Part, Page 11, Act of June 29, 1950:

"That the time during which labor may be performed or improvements made, under the provisions of section 2324 of the Revised Statutes of the United States (section 28 of this title), on any unpatented mining claim in the United States, including Alaska, for the period commencing July 1, 1949, is hereby extended until the hour of 12 o'clock meridian on the 1st day of October 1950: Provided, That assessment work or improvements required for the year ending

at 12 o'clock meridian July 1, 1951, may be commenced immediately following 12 o'clock meridian July 1, 1950."

Act of June 29, 1950, c. 404, 64 Stat 205.

Quoted from Department of Interior Circular No. 430, United States Mining Laws, approved April 11, 1922:

"112. Section 13, act of May 14, 1898, according to native-born citizens of Canada 'the same mining rights and privileges' in the Territory of Alaska as are accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases."

Quoted from Alaska Compiled Laws Annotated, 1949:

"§ 47-3-9. Reciprocity with Canada: Greater rights not to be accorded: Rules and regulations. Native-born citizens of the Dominion of Canada shall be accorded in Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the former Northwest Territory by the laws of the Dominion of Canada or the local laws, rules and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. (30 Stat 415; CLA 1933, § 353; 48 USC § 392.)"

“Rule 7. Pleadings Allowed; Form of Motions

“(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948.”

“Rule 8. General Rules of Pleading

“(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

* * * * *

“(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.”

“Rule 9. Pleading Special Matters

* * * * *

“(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.”

“Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * * * *

“(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.”

“Rule 13. Counterclaim and Cross-Claim

“(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action. As amended Dec. 27, 1946, effective March 19, 1948.”

“Rule 26. Depositions Pending Action

* * * * *

“(d)(3)(5) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.”

“Rule 33. Interrogatories to Parties

“Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after such service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

“Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. As amended Dec. 27, 1946, effective March 19, 1948.”

“Rule 41. Dismissal of Actions

* * * * *

“(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order

for dismissal otherwise specifies, a dismissal under this subdivision or any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits. As amended Dec. 27, 1946, effective March 19, 1948.”

“Rule 52. Findings by the Court

“(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

“(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are

made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.”

October 7, 1953.

Faulkner, Banfield & Boochever,
Attorneys at Law,
Box 1121,
Juneau, Alaska.

Attention: Mr. Norman C. Banfield.

Re: No. 6840-A—E. Miles Flynn v. William L. Pape,
et al.

Dear Norman:

I am informed that Mr. Pape is now enroute to Korea and that probably he will not return until about January 1st next. Therefore, I notify you that the defendants will be unable to go to trial in the above cause on December 14th, next, and that in all likelihood they will not be able to go to trial before about February 1, 1954.

You will recall that last Friday when you called this suit up for trial date setting, I told Judge Folta that I thought Mr. Pape was enroute to Korea and I could not agree to the case being set for December 14th.

Cordially,

R. E. ROBERTSON

RER:er

CC: Clerk District Court, Juneau.

November 12, 1953

Hon. George W. Folta,
U. S. District Judge,
Federal Building,
Ketchikan, Alaska.

Re: Suits Nos. 5744-A, 5745-A, and 5746-A—The Nakat
Packing Corporation—Union Bay Fire.

Dear Judge:

As you know, the only issue remaining to be tried in the above causes is that of the amount of damages suffered by the Plaintiffs.

My associates, Clarke, Clarke & Albertson, and I think that ample time has elapsed for both parties to be ready to try that issue as soon as it meets the Court's convenience.

I am therefore today filing a formal Petition requesting that the trial on those issues be set for December 14, 1953, or as soon thereafter as meets your convenience.

I believe you have one cause presently set for trial on that date, and on the 2nd ultimo, you set Case No. 6840-A, Flynn v. William L. Pape, et al., for trial to follow that case. However, I informed the Court at that time that I understood that one of the defendants, who is an important witness, was enroute to Korea, and I could not agree to the case being set for December 14th. You then told me that I could later make an application for re-setting, which I anticipate doing early next month. The defendants cannot go to trial in that suit in the absence of Defendant Pape, and from what I can presently learn, he will be, in December, at some unknown destination in the Orient.

I had a letter from Wilfred a few days ago, from which I understood that Pat Gilmore had also suggested that if a settlement was not negotiated, an early trial be had; but of course Pat will have to speak for himself, and I don't pretend to otherwise know his views of the question. I write you so that you may be apprised, before your return to Juneau, of the Plaintiffs' desire to have an early trial in the Union Bay Fire Suits.

With best wishes,

Cordially,

R. E. ROBERTSON

RER:jp

3 CC: P. J. Gilmore, Jr.

1 CC: Clarke, Clarke & Albertson

November 28, 1953.

Hon. George W. Folta,

District Judge,

Federal Building,

Juneau, Alaska.

Re: No. 6840-A—Flynn v. Pape, et al.

Dear Judge:

Defendant Pape, so I am informed, is now on a government vessel enroute or on a secret mission to the Far East and will not be back in the States until some time the latter part of January. I am therefore filing a motion that the above case not be tried during December, as it will be impossible for the defendants to go to trial in Pape's absence.

Your very truly,

R. E. ROBERTSON

RER:jp

CC: Faulkner, Banfield & Boochever.

December 7, 1953.

Hon. George W. Folta,
District Judge,
Federal Building,
Anchorage, Alaska.

Re: No. 6840-A—Flynn v. Vevelstad, Pape, et al.

Dear Judge Folta:

Referring to Norman Banfield's letter to you of the 30th ultimo, a copy of which he sent me:

Plaintiff Flynn took Defendant Pape's deposition as an adverse witness, under the Federal Rules of Civil Procedure, in Seattle on September 8th or 9th last, not in October. At the time that Mr. Banfield asked you, on October 2nd last, to set this case for trial on December 14th, I then orally informed you and Mr. Banfield that I understood that Mr. Pape would be absent in the Far East during December and until some time in January, in connection with his service with the Military Sea Transport Service.

Hence, Mr. Banfield then knew that we undoubtedly would not be able to go to trial on December 14th and had something over two months in which to have taken the depositions of his witnesses in New York and elsewhere in the United States.

I personally don't know how much time Mr. Pape spent in Seattle during October and November, but I do know that at the taking of his deposition in Seattle on September 8th or 9th, he told Flynn's attorney that his obligation to answer to Plaintiff's subpoena was a great inconvenience to both him and the military service; in

fact, as I recall, Mr. Ward then apologized to Mr. Pape for having so subpoenaed him.

If Mr. Pape was in Seattle during November, at least commencing on November 18th, 1953, he was aboard a ship of the Military Sea Transport Service and is now serving aboard that ship on a voyage to the Far East, as stated in the enclosed letter of the 3rd instant by the Military Sea Transport Service, signed by L. W. Walters, Director, Industrial Relations Division.

There is no means of obtaining Mr. Pape's return to Juneau by the 14th instant.

Inasmuch as when I was in Ketchikan last week, returning to Juneau today, I understood that you were going to return from Anchorage to Ketchikan, although I did not learn on what date, I am sending a copy of this letter to you in Anchorage, Juneau, and Ketchikan.

Cordially,

R. E. ROBERTSON

encl

RER:jp

CC w/encl: Juneau

Ketchikan

PROOF OF LABOR ON MINING CLAIM

STATE OF WASHINGTON,)
) ss.
COUNTY OF KING.)

Before me the subscriber personally appeared WILLIAM L. PAPE, Brinnan, Washington, who being first duly sworn on oath, deposes and says: That he has performed labor and made improvements upon the following described mining claims, to-wit: The Hope Nickel Lode Mining Claims numbered 1 to 12 inclusive as recorded in Book 11, pages 152 to 158, the Rita Nickel Lode Mining Claims numbered 1 to 4 inclusive recorded in Book 11, pages 151 to 152, the Sverre Nickel Lode Claim, recorded in Book 11, page 161, situated in the Sitka Mining & Recording District, in S. E. Alaska, during the year ending July 1st, 1952, for and on behalf of the Aurora Nickel Company, the owner of said mining claims, in the sum and value of over \$1700.00, (Seventeen Hundred Dollars), that such labor and improvements consisted of Feet of Shaft, feet of Feet of Tunne, open cuts and repairs of the roads, trails, and buildings on the property, also purchase of tools and materials needed, and extended over seventy days' time and that the same was filed by said William L. Pape.

s/William L. Pape

SUBSCRIBED and SWORN to before me this 8th day
of July, 1952.

s/Mabel E. Chuts
Notary Public for Washington.
Commission expires:
October 23, 1952.

(SEAL)

UNITED STATES OF AMERICA,) ss. CERTIFICATE
 TERRITORY OF ALASKA.)

I, FRANK H. B. RICHARDS, the duly appointed, qualified, and acting Commissioner and Ex-Officio Recorder for the Sitka, Alaska, Commissioner's and Recorder's Precinct and District, hereby certify that the foregoing and hereunto attached constitutes a full, true and correct copy of that certain Proof of Labor as it appears of record in Lode Record Book No. 11, on page 204, of the records of said Precinct and District, where it was recorded on July 25, 1952.

IN WITNESS WHEREOF, I have set my hand and official seal this 10th day of December, 1953, in Sitka, Alaska.

FRANK H. B. RICHARDS
 FRANK H. B. RICHARDS
 U. S. Commissioner and Ex-Officio
 Recorder for the Sitka, Alaska,
 Commissioner's and Recorder's
 Precinct and District.

United States of America)
) ss.
Territory of Alaska)

First. That he has personal knowledge of the facts with reference to the annual labor performed and improvements made during the year commencing at 12 o'clock noon, July 1, 1952, upon, or for the benefit of the following named mining claims, Hope Lode Claim 1 to 12 inclusive recorded in Book 11 Pages 152 to 158. The Rita Lode Claims 1 to 4 Recorded in Book 11 Pages 151 to 152. The Svere Lode Claim Record Book 11 Page 161 which said mining claims are located in the Sitka Recording District S. E. Alaska, and are situated as follows:

Second. That during the said year 98 man-days of work were performed and improvements were made upon or for the benefit of the said mining claims, the character and value of which said improvements are as follows:

Total value of improvements: over \$2000

Third. That the said labor was performed and the said improvements were made between the following dates:

From April 24 1953 to June 30 1953.

Fourth. That the said work was done and the said improvements were made at the instance of Aurora Nickel Co. owner.

Fifth. That the actual sum paid for the said work and improvements amounted to \$2,000.00 and that the said amount was paid by William L. Pape.

WILLIAM L. PAPE.

Subscribed and sworn to before me this 3rd day of July, 1953.

R. E. ROBERTSON

Title NOTARY PUBLIC FOR ALASKA

(Notarial Seal) My commission expires June 24, 1957.

UNITED STATES OF AMERICA,)
) ss.
 TERRITORY OF ALASKA.)

I, Frank H. B. Richards, the duly appointed, qualified, and acting Commissioner and Ex-Officio Recorder for the Sitka Alaska, Commissioner's and Recorder's Precinct and District, hereby certify that the foregoing and hereunto attached constitutes a full, true, and correct copy of that certain Affidavit of Annual Labor as it appears of record in Lode Record Book No. 11, on pages 294-295, of the records of said Precinct and District, where it was recorded on July 6, 1953.

FRANK H. B. RICHARDS

U. S. Commissioner and Ex-Officio
 Recorder for the Sitka, Alaska,
 Commissioner's and Recorder's
 Precinct and District.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Rita Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet east side and 300 feet on the west side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running South from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit; and within the lines of said claim in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet E., to a post marked; thence 1500 feet S., to a post marked corner (Cor. No. 2); thence 600 feet W., to a post marked corner (Cor. No. 3); thence 1500 feet N., to a post marked; thence 300 feet E., to a post marked corner (Cor. No. 4), the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

southerly direction from the center of the Miner Isl. line, distant feet, and 2 miles westerly from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Rita #1.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and recorded on the 4th day of October, 1950; at 10:00 A.M. in Lode Claims Record Book No. 11, at page No. 159, Sitka Precinct, Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Rita Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet east side and 300 feet on the west side of the middle of said vein at the surface, so far as can be determined from present development; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running north from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet E., to a post marked 2; thence 1500 feet N., to a post marked 3 corner (Cor. No. 2); thence 600 feet W., to a post marked 4 corner (Cor. No. 3); thence 1500 feet S., to a post marked 5; thence 300 feet E., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a southerly direction from the center of the Miner Isl. line,

distant 4 miles and 2 miles westerly from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Rita #2.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at pages Nos. 159 & 160, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Rita Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles, and variations, as allowed by law, together with 300 feet at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running south from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet E., to a post marked 2; thence 1500 feet S., to a post marked 3 corner (Cor. No. 2); thence 600 feet W., to a post marked 4 corner (cor. No. 3); thence 1500 feet N., to a post marked 5; thence 300 feet E., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a southerly direction from the center of the Miner Isl. line, distant 4 miles and 2 miles westerly from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Rita #3.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950.

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page No. 160, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Rita Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet east side and 300 feet on the west side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running north from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet E., to a post marked 2; thence 1500 feet N., to a post marked 3 corner; thence 600 feet W., to a post marked 4 corner; thence 1500 feet S., to a post marked 5; thence 300 feet E., to a post marked 1 corner, the place of beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a southerly direction from the center of the Miner Isl. line,

distant 4 miles and 2 miles westerly from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Rita #4.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at pages Nos. 160 & 161, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on South side and 300 feet on the North side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running S. W. from center of discovery and feet running from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and with the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet S. E., to a post marked 2; thence 1500 feet S. W., to a post marked 3 corner; thence 600 feet N. W., to a post marked 4 corner; thence 1500 feet N. E., to a post marked 5; thence 300 feet S. E., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

Southerly Direction from Miner Isl. line, distant 4 miles, and $2\frac{1}{2}$ miles from mouth of Bohemia creek and Tide-water.

This claim to be known as the Hope #1.

Discovered 1 October 1950

WILLIAM L. PAPE

Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claim Record Book No. 11, at page No. 152, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on South side and 300 feet on the North side of the middle of said vein at the surface, so far as can be determined from present development; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running N. E. from center of discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claims, in Sitka Mining District, S. E. Alaska described by metes and bounds, as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet N. W., to a post marked 2; thence 1500 feet N. E., to a post marked 3 corner; thence 600 feet S. E., to a post marked 4 corner; thence 1500 feet S. W., to a post marked 5; thence 300 feet N. W., to a post marked 1 corner (Cor. No. 1); thence the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

southerly direction from Miner Isl., distant 4 miles and 2½ miles from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #2.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at pages Nos. 152 and 153, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges, or deposits and surface ground, within the lines of said claim 1500 feet running S. W. from center of discovery, and being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet S. E., to a post marked 2; thence 1500 feet S. W., to a post marked 3 corner (Cor. No. 2); thence 600 feet N. W., to a post marked 4 corner (Cor. No. 3); thence 1500 feet N. E., to a post marked 5; thence 300 feet S. E., to a post marked 1 corner (Cor. No. 4); the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

direction from the center of Miner Isl. line, distant 4 miles, and $2\frac{1}{2}$ miles from mouth of Bohemia Creek and Tidewater.

This claim to be known as the

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page No. 153, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running N. E. from center of discovery; said discovery being situated upon said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet N. W., to a post marked 2; thence 1500 feet N. E., to a post marked 3 corner (Cor. No. 2); thence 600 feet S. E., to a post marked 4 corner (Cor. No. 3); thence 1500 feet S.W., to a post marked 5; thence 300 feet N. W., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a southerly direction from the center of the Miner Isl. line,

distant $4\frac{1}{2}$ miles. and $2\frac{1}{2}$ miles from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #4.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page No. 154, in Sitka precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 lineal feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, with the lines of said claim 1500 feet running S. W. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet S. E., to a post marked 2; thence 1500 feet S. W., to a post marked 3 corner (Cor. No. 2); thence 600 feet N. W. to a post marked 4 corner (Cor. No. 3); thence 1500 feet N. E., to a post marked 5; thence 300 feet S. E., to a post marked 1 corner (Cor. No. 4); thence the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a south-

erly direction from the center of the Miner Isl. line, distant $4\frac{1}{2}$ miles. and $2\frac{1}{2}$ miles from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #5

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in the Lode Claims Record Book No. 11, at pages No. 154 & 155, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents do locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running N. E. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District S. E. Alaska, described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet N. W., to a post marked 2, thence 1500 feet N. E., to a post marked 3 corner (Cor. No. 2); thence 600 feet S. E., to a post marked 4 corner (Cor. No. 3); thence 1500 feet S. W., to a post marked 5; thence 300 feet N. W., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

southerly direction from the center of the Miner Isl. line, distant $4\frac{1}{2}$ miles and $2\frac{1}{2}$ miles from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #6.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11 at page No. 155, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on the east side and 300 feet on the west side of the middle of said vein at the surface, so far as can be determined from present development; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running N. E. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet S. E., to a post marked 2, thence 1500 feet S. W., to a post marked 3 corner (Corner No. 2); thence 600 feet N.W., to a post marked 4 corner (Cor. No. 3); thence 1500 feet N. E., to a post marked 5; thence 300 feet S.E., to a post marked 1 corner; the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a south-

erly direction from the center of the Miner Isl. line, distant 4 miles, and 6500 ft. westerly direction from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #7.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at pages Nos. 155 & 156, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned Citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet on east side and 300 feet on the West side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running S. W. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet N. W., to a post marked 2; thence 1500 feet N.E., to a post marked 3 corner (Cor. No. 2); thence 600 feet S. E., to a post marked 4 corner (Cor. No. 3); thence 1500 feet S. W., to a post marked 5; thence 300 feet N. E., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

southerly direction from the center of the Miner Isl. line, distant 4 miles, and 6500 ft. westerly direction from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #8.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page No. 156, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery, and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet east side and 300 feet on the west side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running S. W. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska, described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet S. E., to a post marked 2; thence 1500 feet S. W., to a post marked 3 corner (Cor. No. 2); thence 600 feet N. W., to a post marked 4 (Cor. No. 3); thence 1500 feet N. E., to a post marked 5; thence 300 feet S. E., to a post marked 1 corner (Cor. No. 4); the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a southerly direction from the center of the Miner Isl. line, distant 4 miles, and 6500 ft. westerly direction from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #9.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)
Locator

Located 1 October 1950

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims record book No. 11, at pages Nos. 156 & 157, in the Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape, the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet west side and 300 feet on the east side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running N. E. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska, described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet N. E., to a post marked 2; thence 1500 feet N. E., to a post marked 3 corner (Cor. No. 2); thence 600 feet S. E., to a post marked 4 corner (Cor. No. 3); thence 1500 feet S. W., to a post marked 5; thence 300 feet N. W., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a southerly direction from the center of the Miner Isl. line, distant 4 miles and 6500 ft. westerly direction from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #10.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator.

Located 1 October 1950.

Filed and Recorded on the 4th day of October, 1950, at 10:00 A.M., in Lode Claim Record Book No. 11, at page No. 157, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet west side and 300 feet on the east side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running S. W. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit; and within the lines of the said claim, in Sitka mining district, S. E. Alaska, described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet S. E., to a post marked 2; thence 1500 feet S. W., to a post marked 3 corner; thence 600 feet N. W., to a post marked 4 corner; thence 1500 feet N. E., to a post marked 5; thence 300 feet S. E., to a post marked 1 corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

southerly direction from the center of the Miner Isl. line, distant 4 miles and 6500 ft. westerly from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #11.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator.

Located 1 October 1950.

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page Nos. 157 & 158, in Sitka Precinct, at Sitka, Alaska.

Exhibit E

LOCATION NOTICE

KNOW ALL MEN BY THESE PRESENTS That I, William L. Pape the undersigned citizen of the United States, has this first day of October 1950, located and claimed, and by these presents does locate and claim, by right of discovery and location, in compliance with the Mining Act of Congress, approved May 10, 1872, and all subsequent Acts, and with local customs, laws and regulations, 1500 linear feet and horizontal measurement on the Hope Nickel lode, vein, ledge or deposit along the vein thereof, with all its dips, angles and variations, as allowed by law, together with 300 feet east side and 300 feet on the west side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim 1500 feet running N. E. from center of discovery; said discovery being situated upon said lode, vein, ledge or deposit, and within the lines of said claim, in Sitka Mining District, S. E. Alaska described by metes and bounds as follows, to-wit:

BEGINNING at Cor. No. 1 (the discovery corner), running thence 300 feet N. W., to a post marked 2; thence 1500 feet N. E., to a post marked 3 corner; thence 600 feet S. E., to a post marked 4 corner; thence 1500 feet S. W., to a post marked 5; thence 300 feet N. W., to a post marked 1; corner, the place beginning.

This claim is further described as follows: The point of discovery upon which this notice is posted is in a

southerly direction from the center of the Miner Isl. line, distant 4 miles and 6500 ft. westerly from mouth of Bohemia Creek and Tidewater.

This claim to be known as the Hope #12.

Discovered 1 October 1950

WILLIAM L. PAPE (SEAL)

Locator.

Located 1 October 1950.

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page No. 158, in Sitka Precinct, at Sitka, Alaska.

Exhibit E
CERTIFICATE OF LOCATION
LODE CLAIM

Notice is hereby given that the undersigned has located and claims by right of discovery a quartz or lode claim 1500 feet in length by 600 feet in width, along the Hope Nickel lode or vein situate on Yacobi Isl., Bohemia Basin, S. E. Alaska together with all the dips, variations, spurs, and angles, and all veins, lodes, ledges and deposits, the tops or apices of which are within the lines thereof, together with all surface ground embraced within the said lines, said claim being 1500 feet in length and 300 feet on each side of the center of said vein or lode, and is particularly described as follows, to-wit:

- (1) The name of said claim shall be the SVERE claim.
- (2) The name-s of the Locators thereof is-are William L. Pape.
- (3) The date of discovery and location thereof is first day of October, 1950.
- (4) The discovery post or stake is situate $3\frac{1}{2}$ miles in a southerly direction from Miner Isl. and 2 miles in a westerly direction from mouth of Bohemia Creek and tidewater, and said claim is marked upon the ground by substantial posts, stakes, and monuments, as prescribed by law, and is described as follows: Commencing at the discovery stake; running thence in an easterly direction 300 feet to post No. 1; thence in a northerly direction 1500 feet to post No. 2; thence in a westerly direction 600 feet to post No. 3; thence in a southerly direction 1500

feet to post No. 4; thence in an easterly direction 300 feet to post discovery No. 1.

The center end lines of said claim are cut, blazed, and marked with posts or monuments, so that the same can be readily traced.

Dated 1 October, 1950.

WILLIAM L. PAPE
Locator.

Filed and Recorded on the 4th day of October, 1950; at 10:00 A.M., in Lode Claims Record Book No. 11, at page No. 161, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the Hope Nickel lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the westerly side and 300 feet on the easterly side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the Sitka mining district, Yacobi Isl. Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, thence in a westerly direction 300 feet to Post #2; thence Southerly 1500 feet to corner No. 3, thence easterly 600 feet to corner No. 4, thence northerly 1500 feet to corner No. 5, thence wes-

terly 300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the group locations.

The name of this location is Doris #1.

Said lode was discovered the 1 day of July A. D., 1952.

Post #1 is located 4.4 miles southerly from Rock point light and 2.8 miles southwesterly from north side entrance of Stag Bay.

Witnesses:	Locator:
EARL LARSEN	AURORA NICKEL COMPANY
HAROLD R. JONES	By W. L. PAPE V.P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A. M., in Lode Claims Record Book No. 11, at page No. 201, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1st day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the Hope Nickel lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the West side and 300 feet on the East side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the Sitka mining district, Yakobi Island and Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a westerly direction 300 feet to Post #2; thence Northerly 1500 feet to corner No. 3, thence Easterly 600 feet to corner No. 4, thence Southerly 1500 feet to corner No. 5, thence Wes-

terly 300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the group of locations.

The name of this location is Doris #2.

Said lode was discovered the 1st day of July A. D., 1952.

Post #1 is located 4.4 miles Southerly from Rock Point Light and 2.8 miles South Westerly from North side entrance of Stag Bay.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

HAROLD R. JONES

By W. L. PAPE

V.P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A.M., in Lode Mining Claims Record Book No. 11, at page No. 201 & 202, in Sitka precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1st day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the Hope Nickel lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the westerly side and 300 feet on the easterly side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposits, and within the lines of said location, in the Sitka Mining district, Yakobi Island and Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a westerly direction 300 feet to post #2 thence Southerly 1500 feet to corner No. 3, thence Easterly 600 feet to corner No. 4 thence Northerly 1500 feet to corner No. 5, thence Wes-

terly 300 feet to corner No. 1, the place of beginning, and further, the line of this location joins and overlaps feet on the of the group locations.

The name of this location is Doris #3.

Said lode was discovered the 1st day of July A. D., 1952.

Post #1 is located 4.4 miles Southerly from Rock Point Light and 2.8 miles South Westerly from North Side entrance of Stag Bay.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

HAROLD R. JONES

By W. L. PAPE

V.P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A. M., in Lode Claims Record Book No. 11, at page No. 202, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the Hope Nickel lode, vein, ledge, or deposit, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the west side and 300 feet on the east side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the Sitka Mining district, Yacobi Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a westerly direction 300 feet to Post #2 thence Northerly 1500 feet to corner No. 3, thence Easterly 600 feet to corner No. 4, thence Southerly 1500 feet to corner No. 5, thence Wes-

terly 300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the group locations.

The name of this location is Doris #4.

Said lode was discovered the 1 day of July A. D., 1952.

Post #1 is located 4.4 miles Southerly from Rock Point Light and 2.8 miles South Westerly from North side entrance of Stag Bay.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

HAROLD R. JONES

By W. L. PAPE

V.P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A. M., in Lode Claims Record Book No. 11, at page No. 203, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the Hope Nickel lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the westerly side and 300 feet on the easterly side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposits, and within the lines of said location, in the Sitka mining district county of and Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a westerly direction 300 feet to post #2; thence Southerly 1500 feet to corner No. 3, thence easterly 600 feet to corner No. 4, thence northerly 1500 feet to corner No. 5, thence westerly

300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the..... group locations.

The name of this location is Svere #2.

Said lode was discovered the first day of July A. D., 1952.

Post #1 is located 4.7 miles in a southerly direction from Miner Isl. and 2 miles in a westerly direction from the mouth of Bohemia Creek.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

FRED S. JONES

By W.L. PAPE

V.P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A. M., in Lode Claims Record Book No. 11, at page No. 198, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs laws and regulations, 1500 linear feet, horizontal measurements, on the nickel-iron lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the north side and 300 feet on the south side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the mining district, county of State of described by metes and bounds as follows, to-wit:

Beginning at Corner No. 1, whence the 300 feet in a northerly direction to Post #2; thence westerly 1500 feet to corner No. 3, thence southerly 600 feet to corner No. 4, thence easterly 1500 feet to corner No. 5, thence northerly 300 feet to corner No. 1, the place of beginning.

And further, the line of this location, joins and overlaps feet on the of the group locations.

The name of this location is Takanis #1.

Said lode, was discovered the 1 day of July A. D., 1952.

The location of Post #1 is southerly 5.7 miles from Rock Point light and northeasterly 4 miles from north side entrance of Stag Bay.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

LELAND BESEL

By W. L. PAPE

Filed and Recorded on the 25th day of July, 1952; at 11:45 A.M., in Lode Claims Record Book No. 11, at pages Nos. 197 & 198, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the nickel-iron lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the north side and 300 feet on the south side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the Sitka mining district, county of and Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a northerly direction 300 feet to corner post #2; thence Westerly 1500 feet to corner No. 3, thence Southerly 600 feet to corner No. 4, thence Easterly 1500 feet to corner No. 5,

thence northerly 300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the group locations.

The name of this location is Beach #1.

Said lode was discovered the 1s day of July A. D., 1952.

Post #1 is located 2600 yards South of Rock Point Light and 50 yards South-west of the mouth of Bohemia Creek.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

LELAND BESEL

By W. L. PAPE V. P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A.M., in Lode Claims Record Book No. 11, at page No. 200, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the nickel-iron lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the Sitka mining district, county of Territory of Alaska described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a northerly direction 300 feet to corner post #2; thence Westerly 1500 feet to corner No. 3, thence Southerly 600 feet to corner No. 4, thence Easterly 1500 feet to corner No. 5,

thence Northerly 300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the group locations.

The name of this location is Beach #2.

Said lode was discovered the 1 day of July A. D., 1952.

Post #1 is located 2800 yards South of Rock Point Light and 250 yards South-west of the mouth of Bohemia Creek.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

LELAND BESEL

By W. L. PAPE V. P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A.M., in Lode Claims Record Book No. 11, at pages Nos. 199 & 200, in Sitka Precinct, at Sitka, Alaska.

Exhibit I

LOCATION CERTIFICATE

Territory of Alaska) ss.

KNOW ALL MEN BY THESE PRESENTS

That we, the undersigned, a corporation has this 1 day of July 1952, located, and claimed, and by these presents does locate, and claim, by right of discovery and location certificate in compliance with the mining acts of Congress, approved May 10, 1872, and with all subsequent acts, and in compliance with the mining laws of the statutes of the Territory of Alaska, and with local customs, laws and regulations, 1500 linear feet, horizontal measurements, on the nickel-iron lode, vein, ledge, or deposits, along the vein thereof, with all its dips, angles, spurs, and variations, as allowed by law, together with 300 feet on the south side and 300 feet on the north side of the middle of said vein at the surface, so far as can be determined from present developments, and all veins, lodes, ledges, spurs, or deposits, and surface grounds within the lines of said location feet running from center of discovery and feet running from center of discovery, said discovery being situated upon said lode, vein, ledge, or deposit, and within the lines of said location, in the Sitka mining district, county of and Territory of Alaska, described by metes and bounds as follows, to-wit:

Beginning at corner No. 1, whence the in a northerly direction 300 feet to corner Post #2; thence Westerly 1500 feet to corner No. 3, thence Southerly 600 feet to corner No. 4, thence Easterly 1500 feet to corner No. 5,

thence Northerly 300 feet to corner No. 1, the place of beginning. And further, the line of this location joins and overlaps feet on the of the group locations.

The name of this location is Beach #3.

Said lode was discovered the 1 day of July A. D., 1952.

Post #1 is located 3000 yards south of Rock Point Light and 450 yards southwest of the mouth of Bohemia Creek.

Witness:

Locator:

EARL LARSEN

AURORA NICKEL COMPANY

LELAND BESEL

By W. L. PAPE V. P.

Filed and Recorded on the 25th day of July, 1952; at 11:45 A.M., in Lode Claims Record Book No. 11, at page No. 199, in Sitka Precinct, at Sitka, Alaska.

From Exhibit 2

LODE CLAIM

Notice of Location

of the Mayflower No. 2 Mining Claim.

Notice is hereby given that the undersigned, having complied with all the requirements of the Laws of the United States, and the local laws, customs and regulations has this 27th day of October A. D. 1952 discovered, located and claimed 1500 linear feet, horizontal measurement of, on and along the lode or vein of quartz or other rock in place bearing gold, silver, copper, lead or other metals, with 300 feet of surface ground on each side of the center line of said claim; together with all dips, spurs, angles, and variations as allowed by law; and all veins, lodes, deposits, and ground within the lines of said claim; situated in the Sitka mining district, Territory of Alaska. The general course of said vein or deposit as nearly as can, at this time, be determined is North-West and South-East. This claim extends 1500 feet North-West and 0.0 feet from the discovery monument on which this notice is posted, along the course of said center line of said claim. Said claim is more particularly described as follows:

Mayflower No. 2 claim is situated in Bohemia Basin, on the east side of Yakobi Island, Alaska, and it adjoins Mayflower No. 5 and Portia No. 1 claims. It is about 3000 ft. North-West of Bohemia Basin Camp.

Witnesses:

s/ E. Norppa

s/ E. M. Flynn

s/ S. S. Maki

Locators and claimants.

UNITED STATES, DISTRICT OF ALASKA.

Division No. 1 Sitka Precinct No. 4 ss.

Frank H. B. Richards, commissioner and Ex-Officio Recorder for the Recording District of Sitka, No. 4, do hereby certify that the within and foregoing instrument of writing was filed for record in my office on the 4 day of Nov A.D. 1952 at 30 minutes past 11 o'clock A.M. and duly recorded in the Lode Record Book No. 11 on page 222 the records of the Recording District of Sitka, No. 4 Division No. 1, Territory of Alaska.

Attest s/ Frank H. B. Richards

Commissioner and Ex Officio Recorder.

From Exhibit 2

LODE CLAIM

Notice of Location

of the Portia No. 3 Mining Claim.

Notice is hereby given that the undersigned, having complied with all the requirements of the Laws of the United States, and the local laws, customs and regulations has this 29th day of October A. D. 1952 discovered, located and claimed 1500 linear feet, horizontal measurement of, on and along the lode or vein of quartz or other rock in place bearing gold, silver, copper, lead or other metals, with 300 feet of surface ground on each side of the center line of said claim; together with all dips, spurs, angles, and variations as allowed by law; and all veins, lodes, deposits, and ground within the lines of said claim; situated in the Sitka mining district, Territory of Alaska. The general course of said vein or deposit as nearly as can, at this time, be determined is North-East and South-West. This claim extends 1500 feet South-West and 0.0 feet from the discovery monument on which this notice is posted, along the course of said center line of said claim. Said claim is more particularly described as follows:

Portia No. 3 claim is situated in Bohemia Basin, on the east side of Yakobi Island, Alaska, and it adjoins Yakobi No. 5 and Portia No. 4 claims. It is about 1500 ft. West of Bohemia Basin Camp.

Witnesses:

s/ E. Norppa

s/ S. S. Maki

s/ E. M. Flynn

Locators and claimants.

UNITED STATES, DISTRICT OF ALASKA.

Division No. 1 Sitka Precinct No. 4 ss.

Frank H. B. Richards, commissioner and Ex-Officio Recorder for the Recording District of Sitka, No. 4, do hereby certify that the within and foregoing instrument of writing was filed for record in my office on the 4 day of Nov A.D. 1952 at 30 minutes past 11 o'clock A.M. and duly recorded in the Lode Record Book No. 11 on page 219 the records of the Recording District of Sitka, No. 4, Division No. 1, Territory of Alaska.

Attest s/ Frank H. B. Richards

Commissioner and Ex Officio Recorder.

From Exhibit 3

LODE CLAIM

Notice of Location

of the Pelican No. 26 Mining Claim.

Notice is hereby given that the undersigned, having complied with all the requirements of the Laws of the United States, and the local laws, customs and regulations has this 24th day of November A. D. 1952, discovered, located and claimed 1500 linear feet, horizontal measurement of, on and along the lode or vein of quartz or other rock in place bearing gold, silver, copper, lead or other metals, with 300 feet of surface ground on each side of the center line of said claim; together with all dips, spurs, angles, and variations as allowed by law; and all veins, lodes, deposits, and ground within the lines of said claim; situated in the Sitka mining district, Territory of Alaska. The general course of said vein or deposit as nearly as can, at this time, be determined is north-west and south-east. This claim extends 1500 feet south-east and 0.0 feet from the discovery monument on which this notice is posted, along the course of said center line of said claim. Said claim is more particularly described as follows:

Pelican No. 26 Mining Claim is situated in the Bohemia Basin, on the east side of Yakobi Island, Alaska, and adjoins Pelican No. 25 and Pelican No. 27. It is about 7800 feet north-east of Bohemia Basin Camp.

Witnesses:

s/ E. Norppa

s/ S. S. Maki

s/ E. M. Flynn

Locator and Claimant.

Filed and Recorded on the 1st of December, 1952; at 1:55 P.M. Frank H. B. Richards, Ex Officio Recorder, Sitka Precinct.

UNITED STATES OF AMERICA,
TERRITORY OF ALASKA,
SITKA RECORDING PRECINCT. ss.

I HEREBY CERTIFY that the foregoing and attached is a full, true and correct copy of the original recording thereof, on file and of record in my office.

Witness my hand and the official seal of my office, this 7th day of July, 1953, at Sitka, Alaska.

FRANK H. B. RICHARDS
Frank H. B. Richards,
U. S. COMMISSIONER and
Ex Officio Recorder for the
Precinct of Sitka.

“Rule 10 (c): Adoption by Reference. Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.”

No. 14,431

IN THE

United States Court of Appeals
For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE,
and AURORA NICKEL COMPANY, a corporation,

Appellants,

VS.

E. MILES FLYNN,

Appellee.

BRIEF FOR APPELLEE.

FAULKNER, BANFIELD & BOOCHEVER,
N. C. BANFIELD,
H. L. FAULKNER,

P. O. Box 1121, Juneau, Alaska,

GEORGE F. WARD,

Hoge Building, Seattle 4, Washington,

Attorneys for Appellee.

FILED

FEB - 9 1955

PAUL P. O'BRIEN,
CLERK



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No. 14,431

IN THE

**United States Court of Appeals
For the Ninth Circuit**

S. H. P. VEVELSTAD, WILLIAM L. PAPE,
and AURORA NICKEL COMPANY, a corporation,

Appellants,

VS.

E. MILES FLYNN,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statement.

The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, Sec. 4, 31 Stat. 322 as amended, 48 USCA, Sec. 101. Since the action is one to determine the adverse claims of appellants to mineral claims it was brought under the provisions of Sec. 56-1-91 Alaska Compiled Laws Annotated, 1949. See paragraphs V, VI and VII of appellee's complaint (Tr. 59-60).

The jurisdiction of this court rests on Sec. 1291 of the Federal Judicial Code.

ANSWER TO APPELLANTS' STATEMENT OF THE CASE.

Appellants' brief contains a "Statement of the Case" which is little more than a summary of the pleadings and various letters written by the respective counsel to each other and to the court regarding the trial date (Pages 11-19). It is followed by a statement of "Evidence" (Pages 19-48) which consists of random selections of evidence from the record which, standing alone, give the impression that the witnesses presented by appellee were incompetent to testify as they did and their testimony is insufficient to establish appellee's title which is the subject of Point 11. This statement wholly disregards the requirement of making a fair statement of that evidence which, if believed by the court, would serve as a basis for its decision, and makes no attempt to present it in the most favorable light to the appellee. We deem it necessary to present a correct statement of facts regarding the staking of the claims, which the court might have found as a basis for its decision, in order to put the case in its proper perspective.

The witnesses, Norppa and Flynn, went to Yakobi Island, in Southeastern Alaska in October and November 1952 with a helper and located the 45 lode mining claims listed in the judgment as having title quieted in appellee.

The corners established by Mr. Norppa and the boundaries marked on 37 of the claims are shown by a red line drawn by Mr. Norppa along the boundaries and posts on Exhibit 1, by direction of the court (Tr. 225, 240). In open country where no blazing of lines

was possible or marking necessary, he did not travel along the lines or do any blazing and has not marked the map in such places with a red line (Tr. 221, 248-250). Also where there were cliffs which could not be climbed he did not blaze the lines (Tr. 255).

Along the lines indicated by a red line on Exhibit 1, Mr. Norppa established corner and center end posts or mounds with posts in them (Tr. 217-221, 223, 231), marked the posts with crayon pencils (Tr. 252-3), blazed the trees along the boundary lines (Tr. 217-221, 223, 231), posted a few location notices indicated by red circles (Tr. 221, 250A), noticed mineral outcrops where he posted notices (Tr. 221) and caused notices to be recorded as location certificates which were identical to the location notices posted by him and Mr. Flynn.

Mr. Flynn, like Mr. Norppa, was an experienced mining engineer (Tr. 211, 212, 265-267), who had studied government reports on the nickel deposits in Bohemia Basin (Tr. 268) and was familiar with the accounts and locations of the ore bodies which covered large irregular areas and do not occur in veins (Tr. 280, 281). He testified that along all claim boundary lines on Exhibit 1, other than those indicated by a red line, he established corner and center end posts or mounds with posts in them (Tr. 283, 298), marked these monuments to identify the monuments (Tr. 283), made discoveries on each claim and a separate discovery for each claim (Tr. 281, 282, 283, 295, 301-305), posted notices of discovery (Tr. 285, 294, 300, 317), marked the claim boundaries (Tr. 283) and

recorded duplicates of the location notices as certificates of location (Tr. 285, 286—Exhibits 2 and 3). He staked Portia 10 and 11 (Tr. 284, 285) and the six Pelican claims (Tr. 288, 291, 292, 294) mentioned in the judgment, in the same manner as the 37 claims previously staked, and recorded the certificates with a map to further identify the claims (Tr. 309, Ex. C).

The validity of the locations by Messrs. Norppa and Flynn are the subject of appellants' point No. 11.

During the winter of 1952-53 appellee became aware of the prior recording of location notices by appellants for 19 claims in October 1950, and 9 claims in July 1952 in about the same location.

In the spring of 1953, when the snow had melted sufficiently, appellee and the witnesses Johnson, Klein and Harrigan made various trips from early May to late November to appellee's claims to determine whether prior locations had actually been made by appellants which conflicted with appellee's claims and to make accurate surveys of both the Flynn claims and any evidence of conflicting locations by appellants. Appellants were then in the process of amending their locations made in 1950 and 1952. No evidence whatsoever, of any locations by appellants, was found by the witnesses Flynn, Johnson, Harrigan or Klein, the last three being disinterested professional men (Tr. 253, 254, 262, 295, 657-663, 665, 669, 682-683). Johnson made, with the help of others under his supervision, a chain and stadia survey of all evidence of locations by appellee and by appellants, except on the Pelican group and where no conflicts would arise (Tr.

164). From these surveys he prepared appellee's Exhibit No. 1 to show the Flynn claims. In the appellants' statement of the Evidence on Page 22 of their brief, it is stated that this exhibit was introduced over the objection of appellants as to remoteness on a promise to connect up the survey of the posts and lines as found in the fall of 1953 with the posts and lines as established in 1952 by Flynn (Tr. 165, 166). At Page 74 of appellants' brief it is stated that no such connection was made by appellee. This is untrue as appears by the testimony of the witnesses Flynn (Tr. 282-284), Norppa (Tr. 215-220) and Johnson (Tr. 171, 612). They also made a map, Appellants' Ex. 6, of all posts, monuments, blazes, boundary markings or other evidence of appellants' purported locations (Tr. 578-580) which was also made as a transparency using the same scale and co-ordinates, Appellants' Ex. 7, so it can be superimposed on appellee's Exhibit No. 1 (Tr. 619). These evidences of an attempt to locate or relocate claims were all created in 1953 as shown by the testimony of Mr. Johnson (Tr. 614) and Mr. Klein (Tr. 683-685).

In appellants' Third Defense, they allege these claims were located by appellant Pape in October 1950 and July 1952 and relocated in the summer of 1953 at which time the Svere No. 3 claim was located for the first time. Appellants have not introduced any testimony whatsoever to even attempt to prove any of these locations. It is true that they have introduced assessment affidavits, recorded location certificates and the deposition of Mr. Pape which covers

all his other activities, but there is still no evidence of discoveries, marking of boundaries or any posts or monuments being erected by Mr. Pape, except for the Nina discovery monument and location notice as stated by Mr. Harrigan (Tr. 662, 663). By Mr. Pape's own admission he didn't know how to stake a claim properly, never blazed or marked any boundaries on the ground, used five instead of seven posts or monuments, made no discovery in any case and put his location notice on a corner post instead of on a discovery post (Tr. 655, 664, 665). He admitted he staked only the Nina in July 1950 before it was opened to location in October 1950 and came back in October and staked almost the same area as the Svere Claim (Tr. 662, 663, 667). There was no evidence of anything being done to locate the Svere, other than two nails in a post (Tr. 662, 663). If the court denied the motion for continuance and for a new trial under the belief that Mr. Pape had no intention of being a witness, it appears from this testimony of Harrigan, a registered Land Office surveyor, (Tr. 653) that any conclusion reached by the Court from the Ward affidavit was confirmed before the motion for new trial came on for argument.

From this evidence the court concluded the Flynn claims were properly located and if there were any deficiencies as to the descriptions in the recorded location certificates, appellants could not question them because they had no claim to the mineral lands whatsoever by reason of never having made a valid location.

The questions arising out of the denial of a continuance for the trial and new trial have been presented by appellants in their statement of the case in somewhat better perspective and the evidence before the court will be discussed in the points hereinafter argued.

ARGUMENT.

POINT 1.

THE COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING THE APPELLANTS TO GO TO TRIAL IN THE ABSENCE OF APPELLANT PAPE.

The following is a chronological list of events leading up to the trial:

June 20, 1953. Mr. Pape told Mr. Ward that he would not be a witness for appellants (Tr. 78).

June 23. Complaint filed (Tr. 8).

July 20-31. Mr. Pape in Seattle, Washington (Tr. 78).

Sept. 10. Deposition of Mr. Pape taken in Seattle (Tr. 343).

Sept. 21. Appellee's motion for Immediate Trial filed (Tr. 75).

Oct. 2. Minute order entered in presence of counsel for both parties setting case for trial to follow a case set for trial on December 14, 1953 at 10:00 a.m. (Tr. 76); appellants informed the court they understood Mr. Pape would be absent in the Far East on December 14th to which the court replied it would

require a motion and proper showing for a postponement (Tr. 137, 149).

Oct. 7. Appellants notified appellee they would insist on a continuance (Tr. 138).

Oct. 12-19. Mr. Pape was registered at the New Windsor Hotel in Seattle, Washington (Tr. 79).

Oct. 17. Appellants were informed Mr. Pape had not gone to the Far East (Tr. 86).

Nov. 7-14. Mr. Pape at his home in Brinnon, Washington (Tr. 79).

Nov. 12. Court informed by appellants' letter that Mr. Pape would not be available December 14th (P. 18 Appendix, Appellants' Brief).

Nov. 14-22. Mr. Pape at New Windsor Hotel in Seattle (Tr. 79). Appellant Vevelstad urged Mr. Pape not to go on voyage to the Far East (Tr. 82).

Nov. 22. Mr. Pape went aboard vessel at Seattle, Washington (Tr. 79).

Nov. 26. Mr. Pape sailed from Seattle for Far East (Tr. 80).

Nov. 30. Appellants filed motion that trial "not be held on December 14, 1953" and stating that Mr. Pape not available until late January, 1954 (Tr. 76).

Dec. 8. Affidavit of George F. Ward filed showing Mr. Pape was in or near Seattle in July, August, September, October and until November 26th (Tr. 50).

Dec. 15. Court found the absence of Mr. Pape was willful (Tr. 152, 154, 155). Appellants refused to pay

costs of appellee if trial postponed (Tr. 158) and case went to trial.

This record shows the appellants started when the case was set for trial to plead the unavailability of the defendant Pape on the date of trial although they had ten weeks to make him available. The appellee took his deposition so as to ascertain the times he made trips to and from the mining claims and the amount of time he spent at the claims, but avoided asking him anything about his locating mineral claims. Appellants' counsel was present when the deposition was taken but propounded no questions (Tr. 432). They simply gambled that if he was not available on December 15th, the court would accept that as an excuse for delaying the trial and that the court would arrange its trial calendar to fit the convenience of the appellant Pape without regard to its own rights or those of appellee.

Appellee received the defendants' letter of October 7th (P. 17, Appendix, Appellants' Brief), notifying appellee that appellants would seek a delay because of the absence of Mr. Pape, but appellee knew Mr. Pape was in Seattle and waited to see what proof appellants would file regarding the absence of Mr. Pape. Counsel for appellants admits he knew on October 12th that Mr. Pape was in Seattle and had not sailed for the Far East, but he did not advise the court or retract his notice (Tr. 86). He allowed the appellee and the court to think Mr. Pape had departed. There was nothing for the appellee to do until called upon

to refute whatever proof appellants submitted in support of the anticipated motion for delay, except that appellee kept informed of Mr. Pape's whereabouts so as to be ready when the motion was filed by appellants. On November 12th appellants again advised the court in an informal manner (P. 18, Appendix, Appellants' Brief) that Mr. Pape would be in the Far East in December but did not state where he was then, when he was leaving, when he would be back or whether Mr. Pape would ever be available. Nor did they submit any formal motion or affidavit. Mr. Vevelstad says he begged Mr. Pape to not go to the Far East on November 26th (Tr. 82, 83). It looks as if appellants knew on or about November 12th that Mr. Pape was planning to depart late that month, so they gave more warning of what they intended to do but failed to even then file a timely motion to ascertain whether the court would grant a delay under those circumstances. The other appellants could have protected themselves by then ascertaining if the court would grant a continuance and if it refused, then Mr. Pape could have been subpoenaed for a deposition under Rule 45(d) F. R. C. P. In fact, since Mr. Pape was deliberately absenting himself, the only safe thing for appellants to do was to subpoena Mr. Pape if his testimony would help them in any way. Instead of making a timely motion they waited until Mr. Pape had departed on November 26th and then filed a motion on November 30th which was not supported by an affidavit as required by Rule 4 of the court below, although it was verified on information

and belief in its entirety by counsel for appellants. No statement was made therein as to when Mr. Pape departed, why he absented himself or what effort was made to obtain his presence for the trial. It was stated he "probably" would return in the latter part of January but it later turned out that he returned January 7, 1954 (Tr. 110). *The court never had any assurance in writing or orally that Mr. Pape would ever appear as a witness.* No time was ever suggested as to when he would be available and even after his return from Korea he stated (Tr. 110) that he was "interested" and "anxious" to appear but he never has promised that he would. The evidence before the court in the affidavit of George F. Ward was exactly to the contrary and showed that Mr. Pape had expressed himself as refusing to be a witness (Tr. 78, 79).

It is apparent from the affidavits filed and the actions of Mr. Pape that he had told Mr. Ward the truth and had been hiding his true intentions from the other appellants. No other theory is consistent with his being in Alaska and the vicinity of Seattle from June to November, except for a trip to Korea in June and July, and then shipping out just before this case was coming on for trial. His only excuse for not complying with Mr. Vevelstad's request to not leave, was that he would lose his job, which is questionable.

From November 26 to January 7th Mr. Pape would probably not earn more than \$800.00. In his counter-claim he states the appellants sustained \$5,000,000 in

damages by reason of being delayed in their working the claims. It seems fantastic that Mr. Pape would delay his chances of making his share of such an enormous sum for fear of losing a job as an electrician. It is also fantastic that any government agency would discharge a man for attending so important a trial in which he had such an interest. It is also fantastic that he was too old to sail October 4th (R-138) but not too old to sail November 26th. The court was entitled to consider all these inconsistencies.

If Mr. Pape was just a witness, he would have no interest in the controversy. But he was a defendant and as his counsel stated in the argument on the motion, Mr. Pape is an officer and stockholder of Aurora Nickel Company. As a defendant he was presumed to be interested. If he is to be allowed to absent himself willfully and claim a right to be at the trial, the court must arrange all its trials for the convenience of every party. As for the other appellants, they were in touch with Mr. Pape, they knew his intentions and they should have protected themselves by a timely motion and a subpoena for a deposition if necessary.

The record shows the extreme inconvenience which would have been caused to appellee and the heavy expense incurred in gathering its witnesses for the trial; also the necessity for disposing of the case before assessment work had to be done (Tr. 80-81). The court asked the appellants if they were agreeable to paying the appellee's expenses which would

result from the delay but the appellants refused to make such payment (Tr. 136, 158). If the other appellants had any faith in Mr. Pape and his testimony, they should have been willing to pay these costs.

At the time of the trial the only evidence before the court as to when Mr. Pape would return to Seattle was the statement of his counsel that he would return in the latter part of January. There is no assurance or even any indication that if the court set the case for a later date after Mr. Pape's return, he would not sail again just as he had already done and ignore the trial date. As stated at 64 C.J. 59, the particular day of the term at which a trial will be had is within the discretion of the court, but here it was a case of delaying over a month and possibly over the term, with no indication that Mr. Pape would appear as a witness. His past action indicated he would not appear.

The court found his absence was willful, that he had not made any affidavit as to his absence, that he was a material witness, that his employment did not exempt him from appearing and due diligence had not been used to secure his attendance (Tr. 152, 153).

The granting or refusal of a continuance "rests in the discretion of the court to which the application is made". 12 Am. Jur. 450. See *Shea v. United States* 260 F. 807, Ninth Circuit, quoting the leading cases of *Isaacs v. United States*, 159 U.S. 487, 16 Sup. Ct. 51, and *Crumpton v. United States*, 138 U.S. 361, 11 Sup. Ct. 355.

In determining whether the court should grant a continuance, it had to consider the law on the subject of an absent witness who is also an absent party.

Mr. Pape was a party to the action and the motion for continuance was urged on his behalf. The rule stated at 17 C.J.S. 211 is that:

“... it must appear that such absence is unavoidable and not due to the party’s own negligence, that a postponement is not asked for the mere purpose of delay; and that, if the continuance is granted, there is a reasonable probability that the party will be able to attend the trial within a reasonable time, such as at the next term of court. . . .”

“*Voluntary absence.* The purely voluntary absence of a party will not justify a continuance on his behalf. . . .” 17 C.J.S. 211.

“*Absence from state.* Except as statutes may otherwise provide, the absence of a party from the state will not ordinarily be considered a sufficient ground for a continuance, unless some good excuse in addition is alleged as the reason for the nonappearance.” 17 C.J.S. 212.

Appellants did not show Mr. Pape’s absence to be unavoidable and the court found it to be willful. There was no showing that he would appear on any later date of trial and the evidence indicated he would refuse to appear unless compelled to do so.

From the standpoint of the other appellants, Mr. Pape was a witness and one with a personal interest in the matter. As stated at 17 C.J.S. 223 it is an

abuse of discretion to deny a continuance because of the absence of a witness only if

“... the application complies with every requirement of the law, is not made merely for delay, and the evidence is material and due diligence is shown”.

The court correctly found the absence was to avoid being a witness and due diligence was not used. A further requirement as to an absent witness is “that the testimony can be obtained at a future time to which it is prayed that the trial be continued” (17 C.J.S. 224). There was no representation or evidence that Mr. Pape would ever testify for the appellants and the motion was simply for delay without any specification as to when defendants would be ready for trial.

When an absent witness is also an absent party a higher degree of diligence is required as stated at 17 C.J.S. 231-2:

“It is generally held that a higher degree of diligence, a stronger case for a continuance on account of the absence of a witness must be shown if that witness is a party to the action, than would be required were he a third person, unless the case presents some peculiar feature from which some material injustice to the party's rights would result in case of trial without postponement. The rule stated in sec. 27 supra, that a party's own absence as a witness is usually not a good ground for a continuance, is especially applicable where the party has not informed his counsel of his whereabouts, where opportunity

has been had to take his deposition, or where he has voluntarily absented himself with full knowledge of the imminence of the trial. A party defendant is not entitled to a continuance in order to obtain the testimony of a codefendant unless proper diligence has been used to secure his presence or his deposition, and where, instead of taking steps to secure his testimony, he has relied on his codefendant's presence at the trial in the face of the fact that every circumstance pointed to his absence at the trial, a continuance should be denied. . . ."

More diligence is also required in seeking the presence of a nonresident. Mr. Pape resided in the State of Washington (Tr. 344) (17 C.J.S. 232).

What constitutes due diligence is for the trial court to determine.

"In general, it depends on whether the legal means for obtaining evidence have been employed to obtain the desired evidence, on the usual course of procedure and course of business, the situation or location of the absent witnesses or desired evidence, the facilities which may be employed to obtain it, and all the facts and circumstances of the case, as, for instance, the length of time applicant has had to procure the attendance of the witness or to obtain the evidence, and the care, or the absence of it, in making search or inquiry for the witness. . . ."

(17 C.J.S. 232.)

"Ordinarily, at least where there are also other circumstances justifying a denial, it is not error, or an abuse of discretion, to deny a continuance

where a witness is amenable to process and applicant has not caused a subpoena to be properly issued and delivered to the proper officer for service, with sufficient information to enable him to find the witness. . . .”

(17 C.J.S. 234.)

“It is not an abuse of discretion, or error, to deny a continuance where no effort has been made to secure the deposition of an absent witness in the manner provided by law, and no excuse is offered for failure to do so. . . .”

(17 C.J.S. 237.)

“... Thus, where no effort is made to secure the deposition until a few days, or even a month under certain circumstances, before the case is called for trial, there is no error in refusing a continuance. . . .”

(17 C.J.S. 238-9.)

Appellants may contend that the absence of Mr. Pape was a surprise and they were unable to get his deposition or to subpoena him. The affidavits show otherwise, but even if true the rule is that unavailing efforts just before trial are not enough. In *Armour & Co. v. Kollmeyer*, 16 L.R.A. N.S. 1110, 1112, the court held that efforts made from March 20, 1906 to May 7, 1906 and from April 29, 1907 to May 3, 1907 to ascertain the whereabouts of a witness was not enough to obtain a continuance where there was no evidence submitted that between May 7, 1906 and April 29, 1907 the defendant had made any effort to

find the witness, serve him with subpoena or take his deposition.

An application or motion for continuance should be made at the earliest practical time after knowledge of the necessity for a continuance is acquired (17 C.J.S. 256). The appellants should have made the motion for a continuance and filed the necessary affidavit of Mr. Pape immediately after October 4th. Mr. Pape was then in Seattle. It was the duty of the appellants, since they knew he would be absent, to ascertain when he would return and make their motion immediately.

Some courts hold that the setting of a case for trial will not be reviewed except upon a plain showing of a gross abuse of discretion. *State v. Kelley*, 21 A.L.R. 156, 27 N.M. 412, 202 P 524.

One cannot reasonably arrive at any conclusion except that Mr. Pape was telling Mr. Ward his true intentions of never appearing for trial while telling the other appellants he would be in the Far East. They had the mistaken opinion that if Mr. Pape actually was in the Far East on the trial date, they would be entitled to a continuance. They also had the mistaken opinion that they are under no obligation to use a deposition when they prefer personal attendance, although the latter was not available unless Mr. Pape would appear voluntarily. They also were uninformed of the necessity for showing, by affidavit of Mr. Page, when he would be available and his willingness to testify, as well as making their motion at the proper time. The court should not be ham-

pered, the administration of justice delayed and the appellee penalized because of appellants' erroneous assumptions and lack of knowledge of the rules and the law.

Appellants' brief states they did not know Mr. Pape would absent himself from the trial (P. 21). If that is true, how could they advise the court that Mr. Pape would be in Korea on December 14th (Tr. 137, 149; Appendix, Appellants' Brief 17, 18).

Appellants complain because the court denied the continuance in the face of the fact that counsel for appellants had repeatedly on October 4, October 7 and November 12 advised the court that Mr. Pape would be unavailable. Appellants should have taken heed from the statement of the court on October 4th when it said that if Mr. Pape was not available counsel could make the proper showing, or as he understood it, file a motion (Tr. 137, 149). Regardless of how the court said it, a motion with an affidavit or other documentary evidence is required (Rule 4, Appendix herein). The court cannot regulate its calendar by information submitted in such manner. If it could, it would repeal the rule. Appellee further contends these letters are not a part of the record in this case and should not be considered by this court.

The only authorities cited in appellants' brief which refer to their Point I, are two citations (P. 56) stating that arbitrary and capricious abuse of discretion is error. They apparently could find no comfort in the authorities as to the requirements for making the motion for continuance in a timely manner, support-

ing the same with affidavits of the proper persons, making a showing as to the willingness of the witness to testify, showing when he will be available, showing by the affidavit of the witness just what he would testify, a showing that due diligence had been unsuccessfully used to obtain the testimony of the witness and that he did not willfully absent himself. None of these tests were met as required by the authorities cited herein by appellee. Under these circumstances the decision of the court in denying the continuance was not arbitrary or capricious nor an abuse of discretion.

POINT 2.

THE COURT DID NOT ABUSE ITS DISCRETION IN GIVING CREDENCE TO GEORGE F. WARD'S AFFIDAVIT.

The affidavit of George F. Ward dated December 1, 1953, contains the following:

a. Recitals of statements by Mr. Pape to Mr. Ward as to Mr. Pape's refusal to be a witness for appellants.

b. Statements as to the whereabouts of Mr. Pape between the commencement of the action and the time of trial.

c. Statements as to the witnesses to be called by appellee and their availability.

Although the appellant Pape returned from Korea on January 7, 1954 (Tr. 110) and the motion for new trial was not argued until April 23, 1954, Mr. Pape has never denied that he was in and near Seattle,

Washington, as stated in Mr. Ward's affidavit, nor has any other proof been submitted to deny that he was so available in and near Seattle until November 26, 1953. Nor has anyone denied the statements made by Mr. Ward as to the witnesses for appellee and their availability. The only parts of Mr. Ward's affidavit which are in dispute, are the statements as to Mr. Pape's refusal to be a witness which Mr. Pape has denied (Tr. 110).

Although the court was very informative as to why it would not give a continuance, (Tr. 135, 136, 147, 152-155) there is nothing in the record or the court's opinion to indicate that its decision turned upon the part of Mr. Ward's affidavit which recites that Mr. Pape refused to be a witness. It is true that the court found the absence of Mr. Pape was intentional but there was plenty of evidence that he absented himself willfully, without relying on the statements claimed to have been made to Mr. Ward. Mr. Pape admits in his own affidavit that he sailed for Korea. He was not forced to go there. He knew this trial was set for three weeks hence. On January 13th Mr. Pape made an affidavit giving as his only excuse for going to Korea that it was part of his employment to do so and "That affiant had used up his leave time and was not able to apply for any further leave until the calendar year 1954". The most one can infer from the affidavit is that he would not have been paid wages for the period of time he was off the job for the trial of this case. Even this weak excuse was not before the court at the time the continuance was

denied. It was not made until after the trial as a basis for a new trial. As the court said at Tr. 702, the court decided the motion on the basis of the showing made at the time of commencing the trial. The record then and later showed his departure was voluntary, his absence was willful and there was no need for the court to place any reliance on the hearsay statements made by Mr. Ward.

As an indication of what the court had in mind when it denied the continuance, we have the court's statements:

The Court. In this case I am convinced from reading the affidavits and motions and so on that Mr. Pape is a material witness, but I am not convinced that due diligence was used in obtaining his attendance, and I should like to hear—I suppose that one of the parties wishes to go on and the other one wishes it continued. Is that the situation?

Mr. Robertson. Yes, your Honor.

Mr. Banfield. We wish to go on.

The Court. Well, as I say, I am convinced that he is a material witness, but I am in doubt whether diligence was used in securing his attendance. Now, if the parties should agree with that tentative conclusion, then it seems to me that the case should be continued but only upon the payment of accrued costs by the defendant. Is there objection to that?

Mr. Robertson. I object to that, your Honor.

The Court. Then I will hear argument as to whether or not due diligence was used in securing his attendance (Tr. 135-136).

The Court. Well, I overlooked the fact that he was a party (Tr. 147).

The Court. Well, I don't think we need to concern ourselves with a lot of these little details. The situation, as I see it, is this, that one of the defendants has willfully absented himself, and I don't know how the Court can continue the case where that appears. Now, don't you have reason to suspect that Pape's nonappearance here is willful?

Mr. Robertson. You mean willful in the sense that he is trying to deal with Mr. Ward?

The Court. No. That it is intentional.

Mr. Robertson: I don't think it is intentional that he is absent from the trial, your Honor.

The Court. Why isn't he here? He is a party and the case was set on October 2nd. He is a party. He isn't a mere witness.

Mr. Robertson. I know he is a party, your Honor. I think I have given every notice that he couldn't be. I don't understand this service of what he is in, your Honor. Apparently, it is some kind of contract service. I always supposed that he was some kind of enlisted man, but, apparently, it is some kind of civil service.

The Court. I don't know of any kind of employment that exempts a party from appearing if he wants his case tried. Now, at least there should be an affidavit from a party who claims that he cannot be at the time and place set for the trial of his case. There is no affidavit here from Pape, and it seems that there is about two months elapsed from the time the case was set until he sailed for Korea. The Court could never dispose of any litigation if a party were disposed to frustrate it by merely not appearing.

Mr. Robertson. Yes, your Honor; but after all there are two other defendants in this case with rights involved. You say because he is a party, but after all he is a material witness to the other two defendants. It certainly isn't our fault he is not here.

The Court. Has he been subpoenaed to appear here as a witness?

Mr. Robertson. There is no way to subpoena him your Honor.

The Court. When he was in Seattle—

Mr. Robertson. Well, I suppose I could have subpoenaed him in—

The Court. —if there was any reason to suspect that he was not in sympathy—

Mr. Robertson. I didn't have any reason at all. I said in my affidavit that in my conversations with him he never in anywise intimated that he had any such talks with Ward. He certainly never told me that at any time. I will admit that at the taking of the deposition he and Mr. Ward seemed to be quite friendly. They knew each other much better than Pape and I knew each other, but that is all I know about it.

The Court. Of course it is a wholly insufficient showing to show that a party is absent under the circumstances here disclosed.

Mr. Banfield. If the Court please, Mr. Vevelstad states here, "I personally urged him not to go on the voyage," but he refused to do it; and, then, if he said he was going, then why didn't they subpoena him if Mr. Vevelstad and Aurora Nickel Company want him here? When are they ever going to get him here?

The Court. The Court cannot tolerate that kind of, as I see it, willful nonappearance, and so

the question now before the Court is whether the Court will continue the case upon assessment of costs or whether it should go ahead, and I am willing to hear from the parties on that (Tr. 152-154).

It is apparent from the record that the court denied the continuance because:

a. Due diligence had not been used to secure Mr. Pape's attendance at the trial.

b. No effort had been used to subpoena him for a deposition even though Mr. Vevelstad begged Mr. Pape to not go to Korea (Tr. 82).

c. Mr. Pape was a defendant and willfully absented himself from the trial without making any written statement as to why he would not be present, but by hearsay it appeared his only excuse was his employment.

The court did not have to give one bit of credence to Mr. Ward's affidavit to arrive at the conclusions expressed by the court. In fact the statements attributed to Mr. Pape by Mr. Ward regarding his refusal to be a witness, could not influence the court in any way in determining that due diligence had not been used. The other appellant's failure to subpoena him and his absence without a justifiable excuse were matters of undisputed fact. The most Mr. Ward's statements could do would be to give the real reason for the failure of the other appellants to subpoena Mr. Pape and for his intentional absence. If the court gave any consideration to these statements by Mr. Ward, they certainly were not controlling or persua-

sive in the court's decision. Even if the statements were false, and the court relied on them, they could not affect the decision.

But there is no reason to believe that these statements are false. The failure of one to pay his Bar Association dues and to be ineligible thereby to practice law, does not make the statements of such an attorney false. Even if Mr. Ward knew his dues were in default, and there is no evidence that he did, and even though he may have willfully deceived the court in his application to appear in the court below, the court can still use its discretion in believing, disbelieving or treating with suspicion the contents of the Ward affidavit. At the time the court denied the continuance it did not know Mr. Ward was in default of his dues, but that matter was brought to the court's attention before this same point was urged as grounds for a new trial (Tr. 107) and the new trial was denied. The court could have then given, and no doubt did give, such consideration to Mr. Ward's credibility as it deserved. It was a matter for the court's discretion at that time.

There is nothing in the record to indicate that the court placed any credence in the statements by Mr. Ward as has been assumed by appellants.

POINT 3.

DISREGARD OF APPELLANTS' REQUEST TO ADDUCE EVIDENCE OF MR. PAPE BEFORE DECISION WAS RENDERED.

Appellants did not at any time move the court to permit them to adduce the evidence of Mr. Pape after the trial of the case, unless the last paragraph of defendants' brief (R-95) can be considered a motion. Therein they request that if the court denies the relief demanded in defendant's pleadings, the case be reopened and defendants be given an opportunity to obtain the evidence. In accordance with Rule 7(b) F.R.C.P., such a request must be by motion in writing unless made during the trial or a hearing. No affidavit was submitted to support the informal request. Although Mr. Pape returned to Seattle on January 7, 1954 (Tr. 110) and made an affidavit of the fact on January 13, 1954 (Tr. 112) stating he was again leaving Seattle on January 20, 1954, and would be gone until March 20, 1954, no affidavit was filed in support of the request made in the brief until March 16, 1954. The court's opinion deciding the case was filed on March 9, 1954. If the court would consider such a request contained in a brief as a motion, it was then and when it made its decision, without any information as to when Mr. Pape would be available, or whether he was willing to be a witness, or would be subpoenaed or what he would testify if he did appear at some indefinite date. Under such circumstances it is not unreasonable that the court ignored such a request made in the brief and decided the case.

The cases in which it has been held that the trial court should reopen the case after argument for the purpose of receiving additional evidence, are cases involving some inadvertence, mistake, accident, peculiar circumstances, surprise or newly discovered evidence, or where unfair advantage has been taken by the other party. This request to take Mr. Pape's testimony after the trial is in an entirely different category. By Mr. Pape the appellants hoped to prove the location of their mining claims and the doing of the assessment work. Their whole defense depended upon his testimony. To rebut such testimony by Mr. Pape would require many witnesses. The appellee was prepared to present "approximately twenty persons" (Tr. 80) but when Mr. Pape sailed for Korea it was obvious that a lesser number would suffice to present appellee's case. The appellee presented only enough to make out a *prima facie* case (Tr. 155) which was seven witnesses. Several of these and many more would have been required to rebut the testimony of Mr. Pape if he had testified that he located the claims which appellants allege he located and had done the assessment work on them. The testimony of Mr. Pape would, with the rebuttal thereto, if it amounted to what defendants claim, have created a very sizeable addition to the record. This is quite different from reopening a case for some small bit of testimony.

The trial court should never reopen a case for further testimony except for good reasons and with a proper showing. An appellate court will interfere

only where there has been a clear abuse of discretion. 26 R.C.L. 1042; 64 C.J. 160. The court may properly refuse to reopen the case where the evidence sought to be introduced was within the knowledge of the party seeking the reopening and available to him at the trial. 64 C.J. 161. Appellants knew the necessity for having Mr. Pape's testimony and it was available to them by ordinary means—deposition and subpoena. Where there is newly discovered evidence not known to exist until after the trial, it is still within the court's discretion to reopen or grant a new trial but in this case the appellants knew where and how to get the evidence and that it was available. There is no abuse of discretion in refusing to reopen a case for the admission of . . . evidence . . . “which it does not appear that he could not have produced before the close of the case”. 64 C.J. 163.

POINT 4.

APPELLANTS' CLAIM OF SUPRISE IN BEING REQUIRED TO GO TO TRIAL WITHOUT THE APPELLANT PAPE.

The appellants claim they were prejudicially surprised in being required to go to trial without Mr. Pape. If they were prepared for trial under the belief that Mr. Pape would be present on the day set by the court and then found to their surprise that Mr. Pape had failed or refused to be present that would have been grounds for a continuance providing they had used due diligence to be informed of his intentions. It is quite a different thing, however, to

be surprised because the court refused to grant a continuance in the face of a finding, which is supported by the evidence, that a defendant deliberately absented himself and the other defendants did not use due diligence and the legal means to obtain his testimony.

The appellants should have known the court would properly apply the legal principles involved.

“Surprise” as a basis for any relief can be pleaded but must be without any fault on the part of the party urging such surprise. It is defined in equity practice in Black’s Law Dictionary as:

“The situation in which a party is placed without any default of his own, which will be injurious to his interests. *Rawle v. Skipwith*, 8 Mart. N.S. (La.) 407.

“Anything which happens without the agency of fault of the party affected by it tending to disturb and confuse the judgment, or to mislead him, of which the opposite party takes an undue advantage, is in equity a surprise, and one species of fraud for which relief is granted . . .”

As grounds for a new trial, Black’s Law Dictionary defines Surprise as:

“. . . that situation in which a party is unexpectedly placed without default on his part, which will work injury to his interests . . .

He must show himself to have been diligent in every state of the proceedings; *Henderson v. Hazlett*, 83 S.E. 907, 908; and that the event was one which ordinary prudence could not have

guarded against; 207 P. 328, 329; Rudin v. Luman, 199 P. 874, 877."

It certainly would not take much diligence on the part of appellants to anticipate that the court would not grant a continuance under these circumstances. Therefore they cannot plead surprise as a basis for either a continuance or review on appeal.

POINT 5.

**CLAIM OF ERROR IN NOT ADMITTING MR. PAPE'S
DEPOSITION IN EVIDENCE.**

A thorough examination of the deposition shows that if the court had read and considered the deposition and given Mr. Pape's testimony full credit for being true, the court's decision in the case could not be affected thereby in any way. There is not one bit of testimony therein as to his staking any claims prior to the staking of claims by appellee. Mr. Pape testified that in 1953 (Tr. 396-7) he staked the Beach No. 4 claim (Tr. 403) and checked the lines of three Beach claims previously staked (Tr. 404). Whatever claims Mr. Flynn has which might conflict with Beach No. 4 were staked in the fall of 1952 (Tr. 100) and were prior to the location of Beach No. 4. The testimony is wholly insufficient anyhow to establish the location of a mining claim. This is the only testimony anywhere in the deposition concerning the location of mining claims.

The court based its opinion on the following with respect to the location of appellants:

1. Inadequate descriptions in the certificates of location as recorded, except as to the 3 Beach claims.

2. Insufficient evidence to show the claims were marked on the ground as required by law.

There is not one word in the deposition of Mr. Pape which touches on either subject. Appellee asked Mr. Pape questions as to when he was on the island, who he was with, conversations with others, the details of assessment work done and many other things of that nature, but he purposely avoided asking anything which could be used as proof of locations by appellants, knowing that Mr. Pape would never again appear as a witness.

The court was correct in stating the deposition was made for discovery purposes only, but it should have been objected to and not admitted because it was irrelevant and immaterial. If its exclusion was error, it was harmless error which should not be disturbed on appeal.

“It is for the reviewing court to determine whether prejudice has resulted; and if such exclusion did not prejudice the prevailing party, and could not have affected the result, the error is harmless. The fact that the trial court may have excluded the evidence upon an objection that was not good in itself, or for an erroneous reason, affords no reason for disturbing the ruling; . . . 5 C.J.S. 1042-1048.

“The exclusion of immaterial evidence is not ground for reversal, . . . 5 C.J.S. 1048.

“Where evidence offered does not tend to prove any issue in the case, its exclusion, even for an

improper reason, is not prejudicial error." 5 C.J.S. 1049.

POINT 6.

CLAIM OF ERROR IN STRIKING AND NOT CONSIDERING
TESTIMONY OF WITNESS RICHELSEN.

Mr. Richelsen attempted to identify the location of appellee's claims and the appellants' claims, so as to show the area of conflict, by drawing Exhibit K from information obtained from Aurora Nickel Company and its officers and from the original location notices filed by Mr. Pape in the Recorder's office (Tr. 448). The information obtained from defendants is obviously hearsay (Tr. 452, 453, 455). The witness was unable to plat the claims from the information in the location notices (Tr. 453, 459). Nevertheless, the court permitted Exhibit K to remain in evidence stating "the exhibit will be retained for whatever value it may have, but I doubt whether it will turn out that it will have any value." There is nothing in the opinion to indicate whether it was ever given any value.

Mr. Richelsen testified that he went on the claims to investigate some diamond drilling done by the government in 1942. He then testified as to the mineral content of the ore, the extent of it as developed by drilling and how it was more or less confined to certain areas. He admitted that he had no information on these matters except that gained from a government publication and conversation with the engineers for the government (Tr. 447). The court took

judicial notice of the publication; (Tr. 463) but after objection on the ground it was hearsay, stated it would not consider the testimony regarding the drilling and extent of the orebody (Tr. 447).

The only other testimony of the witness was in regard to plotting the discovery posts for the claims named Yakobi Nos. 1, 2, 11 and 12 so as to show in his opinion that there would be open ground between the claims. There was no objection or exclusion of this testimony (Tr. 444).

Since the court found the defendant's claims were not sufficiently marked on the ground or sufficiently described in the certificates of location, the exclusion of some of the testimony of Mr. Richelsen could not affect these issues as it did not touch upon them. If it was error to exclude the testimony it was harmless error.

POINT 7.

CLAIM OF ERROR IN HOLDING BOHEMIA BASIN CAMP WAS A NATURAL OBJECT OR PERMANENT MONUMENT.

Appellants' first argument is that Bohemia Basin Camp appears from the testimony to have been at the beach near the mouth of Bohemia Creek and not as the court found, in the valley and to consist of the cabin. This argument was not made a point on appeal (Tr. 717-720). If they had made it a point on appeal, they could not prevail because there is plenty of evidence that this cabin, and its surrounding buildings are known as Bohemia Basin Camp. See testimony

of Mr. Norppa (Tr. 246), Mr. Goodwin who flatly stated it was known as Bohemia Basin Camp (Tr. 575) and Flynn (Tr. 320, Appellants' Brief p. 49). Norppa identified it on the map Appellee's Ex. 1 (Tr. 246) with a blue pencil. Even though some other witnesses, some of whom had never been off the beach, had a different idea of where Bohemia Basin Camp was located, there was plenty of testimony to support the finding expressed in the opinion.

Appellants' next argument is that since the cabin was only occupied temporarily, it is not a "camp", and since it was not a camp, the court erred in holding that the cabin is the Bohemia Basin Camp referred to in the certificates of location recorded by appellee. As stated above, this has not been designated a point on appeal. Appellants do not cite any authorities for the requirement that a place must be continuously inhabited to be a camp. The dictionary definitions imply that a camp is a place of temporary occupation.

CAMP —The ground or spot on which tents, huts, etc., are erected for shelter — as for an army. A single tent, cabin or the like used on a vacation or outing. (Webster's New Collegiate Dictionary, 1945.)

Appellants argue that the U. S. Coast & Geodetic Survey Chart No. 8260 shows "Bohemia Basin" marked on the chart a short distance inland from the mouth of the creek, implying that the upper end of the valley is not part of Bohemia Basin. Such charts are made for mariners and the markings are placed

so as to name what the mariner sees from the water. A mariner sees the mouth of the creek and the lower part of the valley. The chart has only mountain peaks and beach line details as mariners are not interested in the bottoms of inland valleys. If the words "Bohemia Basin" were placed farther inland, the mariner would not be sure of what valley came down to the beach at this point.

Since appellants have not argued their point as to whether Bohemia Basin Camp is a natural object or a permanent monument, we refrain from such argument except to quote and cite:

"The terms 'natural object' or 'permanent monument' . . . may include trees blazed and squared, . . . a rock monument, a prospect hole, . . . a permanent post or stake firmly implanted in the ground, a cabin, a dam, a mill or a known mining claim" 58 C. J. S. 105-106.

Steel v. Prebble, 77 Pac. 2d 418.

POINTS 8 AND 9.

CLAIM OF ERROR IN NOT GRANTING NEW TRIAL.

Appellants contend they were entitled to a new trial on the basis of the denial by Mr. Pape in his affidavit filed March 26, 1954 of the statements attributed to him by Mr. Ward in his affidavit to the effect that he would never be a witness for appellants. As pointed out herein on the discussion of Point 2, there is plenty of other evidence to sustain the court's finding that Mr. Pape absented himself willfully. In considering whether a new trial should be granted, the court could very well refuse it on the grounds that

even if Mr. Pape had made no such statements to Mr. Ward, it would still refuse the new trial because the other evidence shows it was willful. For instance, the court specifically held that the employment of a party is no excuse for his absence (Tr. 153). The main objection to granting the continuance was that due diligence had not been used to obtain his testimony. There is nothing in the affidavit of Mr. Pape which would overcome that objection (Tr. 109-112). Another objection was that appellants refused to advance appellee's cost of appearing for trial (Tr. 136, 158). Nothing in Mr. Pape's affidavit can overcome their refusal to pay these costs nor was there any offer to pay the extra costs of a new trial. As stated under Point 2 *ante*, whether Mr. Pape had actually told Mr. Ward he would not be a witness, was entirely immaterial to the issues on which the court decided to deny the continuance except it may have contributed to its decision on the one point of willful absence. It could have no influence in deciding to deny the continuance on the other grounds.

The other evidence presented by the affidavits of Messrs. Pape, Brown and Breseman are all for the purpose of disputing some minor and immaterial portions of the evidence, except that they indicate that the witnesses would present some evidence of prior locations by Mr. Pape. If this evidence could result in a preponderance of the evidence to overcome the two findings of the court, namely:

- (a) Inadequate descriptions in the certificates of location recorded by appellants, except as to the 3 Beach Claims; and

(b) Insufficient evidence to show the claims were marked on the ground as required by law.

then, and only then, should the trial court grant a new trial.

No testimony of these men can change the descriptions in the location certificates recorded by Mr. Pape (Appellants' Exs. E and I, Appendix Appellants' Brief 27-77); or the fact that "an intelligent person, with a knowledge of the permanent natural objects and permanent monuments in the vicinity seeking to locate the claims by means of the certificates and marks on the ground, could not identify them" (Opinion, Tr. 103). If it was error to deny a new trial, it was harmless error because no new trial could change the location certificates.

Anything which Mr. Pape did to stake the mining claims for appellants in 1950 and 1952 would still show on the ground. Appellants could have shown by the witness Harold Jones who did assessment work on the property in 1952 (Tr. 463-472), with Messrs. Pape, Larson and Besel, or the witnesses Harold Hofstad and Arthur Hofstad who with Bill Walker and John Breseman (Tr. 473-477) did assessment work in 1953 on the claims, just what they saw as evidence of claims having been staked by Mr. Pape in 1950 and 1952. They could hardly spend weeks on the claims without seeing whether posts had been set, blazed and marked as required by law, whether the claims had boundary lines marked on the ground and discovery notices posted. These four witnesses and four other persons could have been used for this pur-

pose. Instead the testimony was confined to statements by Hofstad that he helped amend location notices and readjust and repair monuments (Tr. 486, 487), statements by Arthur Hofstad that he helped post amended certificates (Tr. 502), repaired a few monuments (Tr. 504) and did some blazing in 1953 (Tr. 510), and statements by Edward Engdahl that in June, 1950 (before the claims were open to location) he had blazed old claim lines and corner posts, put up monuments but staked no claims (Tr. 516-518) but in 1953 they staked a claim on the beach (Tr. 520). These witnesses may not have been able to testify as to the number and identity of the claims but they at least could have been asked by appellants as to whether it appeared to them that the claims were properly staked with all the corner posts, boundaries marked and notices posted. This appears to have been studiously avoided. Harold Jones did not even mention any evidence of prior locations.

Mr. Vevelstad was on the claims in 1953 (Tr. 525). He testified that Mr. Pape's location notices were posted (Tr. 526, 527), he amended locations (Tr. 535), testified as to the exact location of appellants' claims (Tr. 537), and saw Mr. Pape's discoveries made in 1950 (Tr. 564). In spite of all his knowledge of the Pape locations he did not say one word about there being any corner posts or side or end lines brushed out, blazed or otherwise marked on the ground.

The complaint in this case was filed on June 23, 1953. The appellants had plenty of time before the trial in December to make a thorough examination of

the claims which they say Mr. Pape staked and to survey, map and make notes on the adequacy of his markings on the ground and other requirements. They did not need Mr. Pape to show them the claims if they were adequately marked on the ground. Mr. Pape could add nothing to the marks by his presence in court, but without him they could have proved by others exactly what Mr. Pape had done in 1950 and 1952, in the same way the appellee proved by the witnesses Johnson, Klein and Harrigan the extent to which Pape had staked claims, and the extent to which he failed to meet the requirements.

“Where the unsuccessful party might, with reasonable diligence, have produced other testimony at the trial of the same character and to the same point as that alleged to have been newly discovered, a new trial should be refused.” 66 CJS 294.

The absence of Mr. Pape during the trial and his subsequent statement by affidavit that he located some claims, does not make his testimony newly discovered. It was always known by appellants that if they had any claims at all, it was through Mr. Pape's locations.

“Moreover, facts are not newly discovered because the witness who could have testified thereto is temporarily unavailable, where movant failed to subpoena such witness.” 66 CJS 297.

The testimony of Mr. Pape, Mr. Breseman and Mr. Brown was available and known to appellants because Mr. Pape was in Seattle for over seven weeks after this case was set for trial. He could have been subpoenaed for a deposition or he could have been in-

terrogated by the other appellants at the time his deposition was taken by appellee on September 10, 1953 (Tr. 344). The part played by both Brown and Breseman had been detailed in the deposition of Mr. Pape (Tr. 354, 363, 375, 426, 427). Appellants were then aware that they had information and if appellants did not investigate and determine before the trial whether they wanted to use these witnesses, they could not wait until after the trial and ask for a new trial to present their testimony.

“No matter how material the testimony may be, an applicant for a new trial on the ground of newly discovered evidence must have used ordinary diligence to discover and produce the evidence at the trial.” 66 CJS 298.

“Ordinarily a new trial will not be granted for newly discovered evidence which might have been discovered before the trial by diligently making proper search or inquiry, as of a coparty, . . . or of an agent . . . or co-partner.” 66 CJS 304-5.

The court was called on to consider whether the testimony of these witnesses even if much more extensive and detailed than was set forth in their affidavits could possibly change the findings of the court. It is obvious that they could not overcome the lack of sufficient descriptions in the location certificates, especially since the laws of Alaska provide:

“Any attempted location of a mining claim that does not fully comply with the provisions of this act shall be null and void.” Sec. 47-3-30 Alaska Compiled Laws Annotated 1949. Appendix, Appellants’ Brief pp. 6-7.

Whether they could establish sufficient markings on the ground was a matter for determination by the court below, and whether the new evidence would require a different decision is the test. 66 CJS 312. The court may exercise considerable discretion in granting or denying a new trial. 66 CJS 484. It certainly had plenty of reasons to sustain its denial of a new trial. It was not an abuse of discretion to do so.

POINT 10.

**CLAIM OF ERROR BECAUSE NO JUDGMENT WAS
ENTERED ON APPELLANTS' COUNTERCLAIM.**

Appellants filed a "Fourth Defense and Counterclaim" for \$5,000,000.00 damages for loss of profits and \$15,000,000.00 exemplary damages. No reply was filed by appellee.

Rule 7(a) FRCP requires a reply to be filed to "a counter-claim denominated as such." It also prohibits a reply to a defense contained in an answer except when the court orders a reply to be filed to an answer. If it is a defense, appellee was prohibited from filing a reply, if it is a counter-claim, appellee was required to file a reply or admit the contents thereof (Rule 8(d) FRCP), unless, as in this case, it can be said that it was not "denominated as such." A search of the decisions and texts on Rules 7(a) and 8(d) fail to reveal any such circumstance having been reported. Whether a plaintiff is required to file a reply to a hybrid such as this which is denominated both as an

affirmative defense and, as a reply seems to be a matter of first impression. It may not be necessary however to rule on this point. If the court finds for appellee on any one of the other arguments on this point, *supra*, it can avoid deciding the question.

Appellee in his amended complaint alleges his performance of each of the steps necessary to stake his claims in Alaska. He then alleges that appellants claim some interest in the area covered by his claims by reason of purported conflicting prior locations which cannot be identified or located on the ground and which are alleged by appellee to be invalid (Tr. 60) and create a cloud on appellee's title. Appellants answer denying the material allegations in their "Second Defense" and setting up a "Third Defense" (Tr. 68) in which they allege their ownership of certain prior locations and compliance with each of the requirements of law for making such locations and keeping them in good standing. They then allege in the "Third Defense" that appellee's claims were located after appellants located their claims, that they are invalid, and they specifically allege a failure by appellee to comply with each of the requirements of the mining laws on making locations. They then allege that appellee's claims constitute a cloud on appellants' titles.

Under Rule 8(d) FRCP, this "Third Defense" and each allegation therein is "taken as denied or avoided." Appellants then set forth their "Fourth Defense and Counterclaim" which consists of three parts. The first is an incorporation of the "Third

Defense" by reference. This part is already "taken as denied or avoided."

Appellee should not be required to deny an allegation which by the rules is already denied or avoided. The validity of the two sets of claims is here put in issue and no judgment can be entered except on a finding by the court on those issues. The court found them for the appellee.

The second part is an allegation that while appellants were in possession, appellee located claims blanketing the area "by pretended locations of 102 pretended mining claims, mentioned in plaintiff's (appellee's) amended complaint" (Tr. 74) and caused notices to be recorded, thus preventing appellants from mining the claims or selling them, and preventing the minerals therefrom from reaching the markets of the world to compete with other minerals. Appellee had specifically alleged in his amended complaint that he was in possession of the land he located at the time of location and thereafter (Tr. 59, 60). Appellee had alleged in his amended complaint his full compliance with each requirement of the law for staking mining claims, which constitutes a denial of appellants' allegation that appellee's claims are "pretended mining claims" (Tr. 74). Since the questions of who was in possession and whether appellee's claims were pretended or real mining locations were put in issue, the court could not enter a judgment on the counterclaim, even if it is considered to be denominated as such, because of a failure to again put at issue what is already at issue.

Then appellants allege that the location notices of appellee were recorded. This is alleged in the complaint and it can do no harm to appellee to have it admitted. The next allegation therein is that appellee's locations prevented appellants from mining or selling their claims and prevented the minerals from reaching the market to compete with minerals mined elsewhere. The purpose is immaterial and the admission of such an allegation, by itself, does not entitle the appellants to a judgment.

The third part of the "Fourth Defense and Counterclaim" is an allegation of the amount of damages which under Rule 8(d) FRCP is not admitted by failure to file a responsive pleading where one is required. The court could not enter judgment on the counterclaim without proof of damages and the proof is wholly inadequate to sustain a judgment.

The only testimony on damages is that given by the appellant Vevelstad who stated the National Production Authority was "going to finance all the property" but declined because of Mr. Flynn locating his claims (Tr. 545-546). He calculated the \$5,000,000 loss of profits by stating that it was the same sum undesignated persons had threatened to sue for from the Howe Sound Company. In other words since somebody else had threatened to sue for \$5,000,000 on unspecified claims, Vevelstad said "so I used the same figures" (Tr. 546). Later (Tr. 547) he testified "Well, I just took a figure. There is nothing definite, you know, because, if you had the plant operating, the plant would earn annually sixty million dollars" (Tr. 549).

The whole claim for damages is so nebulous and fantastic that the damages claimed could not even be described as speculative.

His claim of being financed by the National Production Authority and his counsel's reference to the term "National Certificate of Authority" are without any basis whatsoever.

The National Production Authority was created by the Secretary of Commerce (F. R. Doc. 50-8068, filed Sept. 13, 1950, 15 F. R. 6182) to carry out the provisions of the Defense Production Act of 1950 (Sept. 8, 1950, c. 932, Sec. 1, 64 Stat. 798) which were delegated to the Secretary of Commerce by Executive Order 10,161 (Sept. 12, 1950, 15 F. R. 6105). The National Production Authority had no authority delegated to it to make loans to anyone. The Secretary of Commerce had no authority to do so and therefore could not delegate such authority. The power to make loans was delegated under Executive Order 10,161, ante, to the Reconstruction Finance Corporation by Sec. 303, Part III thereof, and then only upon certification as to necessity by the Secretary of the Interior as to metals and minerals. The same section conferred authority on the General Services Administration to purchase and stockpile metals and minerals.

Regardless of whether the allegations of the "Fourth Defense and Counterclaim" are deemed admitted or denied, no judgment can be based on such meager testimony of damages which is mere guesswork. No evidence was submitted as to the quantity or quality of the ore, the cost of extraction, the value

of it on the market and the resultant profit, or what the appellants could sell their interest for.

“However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some date from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered; and when compensatory damages are susceptible of proof with approximate accuracy and may be measured with some degree of certainty, they must be so proved even in actions of tort.” See 25 C.J.S. 496.

The court below took the view that the allegations of the “Fourth Defense and Counterclaim” as to failure of appellee to comply with the provisions of the law in staking his claims, were “merely denials in affirmative form of the allegations of the complaint.” Also that “Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence, I conclude that the failure to file a reply in the instant case does not constitute an admission under Rules 7(a) and 8(d) FRCP.”

Under Rule 8(f) all pleadings must be construed so as to do substantial justice. That is the way the court below construed the pleadings.

If, as the court below has said, the appellee cannot be forced to repeat in negative form the allegations

of its complaint, or deny what is already denied under the "Third Defense" and the rules, then the whole of the counterclaim was already at issue except for the extent of the damages which Rule 8(d) puts in issue.

POINT 11.

WHETHER APPELLEE'S CLAIMS WERE LOCATED AND CERTIFICATES OF LOCATION FILED ACCORDING TO LAW.

Appellants have called attention to many irrelevant and immaterial facts in support of their contention that appellee did not properly locate and record notice of his claims. Appellee herein replies to each of appellants' material statements.

It is true that appellee did not testify as to whether the content of the minerals in the rock at the points of discovery would justify a reasonable man to mine it. The test is not whether the ore is rich enough to mine but is whether it is rich enough to justify further prospecting and development.

McShane v. Kenkle, 44 P. 979;

Cameron v. U. S., 252 U.S. 450, 40 Sup.Ct. 410.

Whether the ore found was rich enough to justify further expenditure toward making a mine is a question of fact to be determined by the court from all the evidence and need not be determined from opinions expressed by a witness.

Columbia C. Min. Co. v. Duchess etc. Co., 79 P. 385.

The court could reach such a conclusion from the contents of the Department of Interior report of in-

vestigation of "Yakobi Island Nickel Deposit" No. 14182 which was identified and brought to the court's attention (Tr. 277), Sitka Quadrangle (DD-8), which is a geological map of which the court said it would take judicial notice (Tr. 279), and the testimony of Mr. Flynn as to the mineral content of the rock in place (Tr. 270-272, 281, 282, 289-290). The court specifically found the testimony of Mr. Flynn to be sufficient to "support the finding of a valid discovery" (Tr. 106).

Appellants state that Mr. Flynn testified (at Tr. 281) that his discovery stakes and notices were on end lines of his claims. An examination of the testimony shows his counsel asked him if mineralization showed at each of the "end lines between the various claims upon which your discovery posts are located and your discovery notices posted." The witness answered that such mineralization appeared all "along the line there and particularly at the places where I put in the posts." The witness proceeded to answer the question as to mineralization without confirming or denying that all his claims had discoveries at the end lines. It is obvious that the implication raised by the form of his counsel's question was not true, especially in view of Mr. Flynn's testimony elsewhere to the effect that most of his discoveries were near an end line but some were not and a separate post was put up for the discovery in every case (Tr. 228, 271, 272, 281, 282, 291, 292, 294, 295, 301-307, 313). Any inference by appellants that there was not a separate discovery for each claim is completely dispelled by the record.

Appellants devote considerable space to pointing out that appellee's location certificates and notices all state that the claims run 1500 feet in one direction from the discovery monument, whereas the record at the places cited in the preceding paragraph shows that the discoveries were generally near an end line common to two claims (called a center end line as distinguished from a center line of a claim) from which Mr. Flynn would walk in each direction along the center lines to find a discovery if one was not within the claim near the end line. The testimony shows he and Norppa made their plans at night as to what they would do the next day and made out their notices for the claims they sketched on a contour map (Tr. 233, 277, 285). Mr. Flynn expected to be able to, and in almost all cases did, find a discovery near the end line. Not knowing in advance how far away from the end line it would be, he made all the notices so the claim would be described as running 1500 feet in one direction from the discovery which would be near an end line. No person could be deceived by this inaccuracy. The center, side and end lines were marked on the ground; posts were erected at each corner, the discovery and both ends of the center lines; the discovery posts, the posts at each end of the center line, and each corner post were marked to show which posts they were (Tr. 217-225, 231, 240, 252-253, 283-285, 288, 291-294, 298). One might be inconvenienced on a few claims if he took copies of the location certificates and tried to find the discovery posts but on only 5 claims are the discovery posts more than 30 feet and

less than 70 feet from the place stated in the notice and on only one claim is the discovery more than 70 feet from the place stated (Tr. 22, 23). Appellants claim the locations are void because of such inaccuracy.

As stated in Morrison's Mining Rights, 16th Ed., p. 59, "as the result of carelessness, accident or defective instruments, variations between the courses called for in the record and the monuments on the ground are matters of constant occurrence. The general rule in such cases is that the monuments control."

Culacott v. Cash G. & S. Min. Co., 6 Pac. 211;

Book v. Justice Mining Co., 58 F. 106;

Treadwell v. Marrs, 83 P. 350;

J. E. Riley Inv. Co. v. Sakow, 9th Cir., 98 F. 2d 8.

"As a general rule a mining location is not rendered invalid by a mere variation or discrepancy between the boundaries of a claim as marked on the ground and the courses and distances described in the location notice or certificate." 58 CJS 106.

"In the absence of fraud in such a case the locator may claim accordingly." 58 CJS 106-7.

This rule of construction is specifically provided in the rules for construing the description of a conveyance of real property in Alaska. 58-7-3 Alaska Compiled Laws Annotated 1949. There is no evidence of fraud in such inaccuracies and the record supports the trial court's finding that appellee marked his claims on the ground as required by law.

“As a general rule, a substantial compliance in good faith with the requirements of the statute or regulation in the matter of posting notice is required and is sufficient . . . ,

. . . if by any reasonable construction of the language employed it imports notice to subsequent locators that the ground upon which it is posted is claimed by another and the extent thereof, it is sufficient.”

“In determining the sufficiency of the contents of the notice it should be liberally construed with the view to protect the miner in the enjoyment of his rights. . . .” 58 CJS 97.

Appellants claim appellee's location notices (Exhibits 2, 3 and 4) do not state “the width on each side of the center of such lode or vein,” but instead stated they include “300 feet of surface ground on each side of the center line of said claim.” This is indeed a most trifling variation from the statute, especially when each notice is taken as a whole. Each notice states “the undersigned . . . has . . . discovered, located and claimed 1500 linear feet horizontal measurement of, on and along the lode or vein with 300 feet of surface ground on each side of the center line of said claim,” and also “This claim extends 1500 feet from the discovery monument on which this notice is posted, along the course of said center line of said claim.” Taken together these portions of the notice state the ground located runs 1500 feet along the “lode or vein” and 1500 feet along the “center line of said claim” which makes the two identical. It also states that the locator claims “300 feet of surface ground

on each side of the center line of said claim" which, when construed with the rest of the notice, shows the claim extends 300 feet on each side of the "lode or vein" as required by the statute. In any event, there is no evidence of any fraud, there has been a substantial compliance, the notice was adequate warning of what was claimed when taken with the markings on the ground and the notice would not be invalidated by such a trifling mistake. If it were invalidated, it is doubtful if any location notice in Alaska is valid even though printed on a form as are these by a printing company.

Appellants, without arguing the point, state the descriptions in the notices are not tied in to a natural object or permanent monument, although they are all tied to Bohemia Basin Camp. This is discussed by appellee under Point 7.

Appellants contend that if the location certificates are sufficient, even though the claims do not extend exactly 1500 feet in one direction from the discovery stake, then there must be open ground between the claims of appellee. If so, there is nothing to stop appellants from validly locating such ground and such fractions are not in dispute. This assumption of appellants is founded on a belief that in one way or another, the appellee should be bound by, and the location of his claims determined by the inaccuracy in the descriptions instead of by the stakes and boundaries marked on the ground. He cites no authority for such a proposition.

POINT 12.**PAPE'S PROOFS OF LABOR BEING PRIMA FACIE EVIDENCE
OF THE PERFORMANCE OF ANNUAL LABOR.**

Whether or not the proofs of labor recorded by appellants are prima facie evidence of the work therein claimed to have been done is of no importance, because the performance of annual labor does not create any rights in claims which have not been located according to law. The court found appellants' claims were not adequately marked on the ground nor sufficiently described in the recorded notices. However, the court did not hold the proofs of labor were not prima facie evidence of the work done. It decided that the work done was performed outside the claims for the benefit of non-contiguous claims and under such circumstances the burden of proof to show that such work benefits the claims, is on the one making the claim. "This burden was not sustained by the defendants." (Opinion, Tr. 104 and citing authorities.)

POINT 13.**FAILURE OF APPELLEE TO FILE A REPLY BRIEF
TO APPELLANTS' TRIAL BRIEF.**

Appellants' claim that the failure of appellee to file a reply brief to the trial brief of appellants constitutes a waiver and admission of appellants' "argument on those affirmative issues and charges" set forth in appellants' Third Defense and Counterclaim; although they admit they have no authority for such a contention. Since the appellee did not

designate any part of the contents of the record on appeal and appellants excluded the trial briefs from the record except portions printed at Tr. 93-95, which are not germane to the argument on this point, the other portions of the trial briefs are not part of the record. This fact precludes any argument on their contents. Appellants' point 13 cannot be considered under such circumstances.

If there is any merit to such a fanciful argument, it is not applicable in this case because appellants have no basis for any award of damages or judgment quieting title in appellants, for the simple reason that they did not prove the ownership of a single valid mining claim. Having no title they could suffer no damages. Appellee simply refrained from wasting his counsel's time and the court's time by replying to arguments, the replies to which were evident to the court without any reply brief.

POINT 14.

APPELLANTS' CLAIM THAT THE BURDEN OF PROOF WAS PLACED UPON THE APPELLANTS.

Appellants contend that since the trial court in its opinion first set forth its reasons for holding the appellants' claims to be invalid and then its reasons for holding the appellee's claims to be valid, the court "erroneously either cast the burden upon appellants or thought they were the plaintiffs". Appellants admit that the order in which the points are set forth in an opinion does not affect the result (Appellants' brief

p. 79). Appellee can see no point in making such an argument if it does not affect the result, and submit that the arrangement of the portions of an opinion is no indication of where the court places the burden of proof.

Appellee admits the burden of proof was on him to prove the title to his mineral claims. This he did by first proving the performance of all the acts necessary to locate, stake and record notice of the claims according to law by the testimony of Flynn, Norppa and Johnson with his surveys, as cited with references to the pertinent portions of the record, in appellee's Answer to Statement of the Case, ante. Appellee also proved by the witnesses Flynn, Johnson, Harrigan and Klein (Tr. 253, 254, 262, 295, 657-663, 665, 669, 682-683) that the ground was open to location when he staked it, with no evidence of any prior locations except the notice on the Nina claim which is not involved in this case. No other allegations of the complaint had to be proved by appellee because those contained in Paragraphs VI and VII of the amended complaint (Tr. 60) alleging a conflict in area with the purported claims of appellants, their claims to such conflicting areas and the cloud on the title created thereby were all admitted in appellants' answer (Tr. 68) and affirmatively alleged in the Third Defense.

At this point in the trial appellee had made out a prima facie case, and if appellants had not gone forward with their evidence, appellee would have been entitled to a decree.

“When plaintiff has made out a prima facie case the burden of going forward with the evidence

will be shifted to defendant; and it is necessary only for plaintiff to make out a prima facie case in order to put defendant on his proof, but the burden of proof which rests upon plaintiff when the allegations of the petition are denied does not shift." 74 CJS 122.

"The courts frequently do say that when plaintiff in an action to quiet title has made out a prima facie case the burden of proof shifts to defendant. The difficulty arises because the words 'burden of proof' are used in two senses; one to indicate the burden which rests upon the plaintiff when the allegations of the petition are denied, and the other to indicate the duty to meet and rebut some evidence introduced by the adverse party by proof to overbear it in the mind of the tribunal. The burden of proof in the former case does not shift. The duty of going forward with the evidence may shift from time to time." (*Lake Front East Fifty-Fifth Street Corp. v. City of Cleveland*, 7 Ohio Supp. 17, 19, affirmed, App. 36 NE 2d 196, appeal dismissed 38 NE 2d 410, 139 Ohio St. 410.)

There is nothing in the court's opinion from which it can be inferred that the court did not thoroughly understand the burden of proof was on appellee as plaintiff and the duty on appellants as defendants was to go forward with their evidence and try to overcome the prima facie case made by appellee. Nothing more was required of appellants.

Moreover appellants were seeking affirmative relief and a decree quieting title in them as to their own claims, which puts them in the same position as ap-

pellee with the same burden but only as to their own claims. The court had to decide their petition too.

Appellants complain that appellee did not prove the extent of the conflict between the two groups of claims. The proof shows that appellee knew where his claims were because he located them and had surveyed them but it was absolutely impossible to tell where the appellants' purported claims were located. It is apparent appellants did not themselves know where their purported claims were located. Even the descriptions in their location certificates were so erroneous that the court found from the evidence of Mr. Richelsen (Tr. 448-459) that the descriptions were inadequate "to enable any person to ascertain the situs of the claims" (Tr. 101). Descriptions in notices are of course only general and to determine the actual extent of conflict one must survey the boundaries of the claims as marked on the ground. As pointed out above, there was no evidence on the ground of the locations claimed to have been made by Mr. Pape in 1950 and 1952 until the summer of 1953 after appellee had located his claims, when appellants started to amend their purported locations and made a few marks on posts as shown by the testimony of the witnesses Johnson and Klein (Tr. 614, 683-685), which were surveyed and platted as Exhibit 6 and made into a transparency as Exhibit 7 showing all posts, monuments, blazes, boundary markings and other evidence of appellants' purported locations (Tr. 578-580). The impossibility of showing the extent of the conflict is apparent from the fact that appellee's claims only

existed on paper and the few posts etc. erected in 1953 did not even make out a pattern of a single complete claim.

The extent of the conflict is immaterial when the evidence discloses as it does here that the appellants had no mineral locations.

POINT 15.

**NECESSITY FOR APPELLEE TO RELY UPON
THE STRENGTH OF HIS OWN TITLE.**

Appellee did rely on the strength of his own title and proved all the allegations of the complaint which were not admitted by appellants in their answer, and affirmatively alleged by them in their Third Defense. In the second paragraph under Point 14 of this brief appellee has set forth the citations to the testimony and named the witnesses who proved the full compliance of appellee with the laws on locating and recording mining claims and the fact that the ground was open to location when appellee made his locations. That proof coupled with the admissions of appellants by their pleadings proved the strength of appellee's title and was found by the court to be sufficient. Appellants seem to be arguing that appellee failed to prove that the claims of appellants were invalid. They simply ignore appellee's proof by four witnesses that there was no evidence of any locations in 1950 or 1952 or any other time prior to the locations made by appellee in the fall of 1952. Nor was this testimony all on rebuttal as stated by appellants in their brief (p.

81) because the witnesses Norppa and Flynn both testified in appellee's case in chief to there being no evidence of recent locations when they staked appellee's claims (Tr. 253, 254, 262, 295).

POINT 16.

REQUIREMENT THAT APPELLEE PROVE ON HIS CASE IN CHIEF THE EXTENT OF CONFLICT BETWEEN THE CLAIMS OF THE PARTIES.

We agree with appellants that a plaintiff in a suit to quiet title must prove that his rights have been interfered with, that defendants' claims are invalid and constitute a cloud on plaintiff's title, unless such allegations are admitted by the defendants. Appellee alleged these facts (Tr. 60) in his amended complaint. Appellants admitted in their answer that they claimed title and possession to so much of the area embraced within appellee's claims as was embraced with appellants' purported claims (Tr. 68); allege that they recorded the notices of their claims (Tr. 70); allege that the appellee's claims constitute a cloud upon the title to appellants' claims (Tr. 73) to the extent of the conflict between them, but failed to identify where their claims were located. The appellee could not survey appellants' claims because they simply did not exist and there was nothing to survey until appellants started to amend their locations in 1953 and make some marks which could be surveyed and platted as Exhibits 6 and 7. The whole case was tried with both parties taking the position that a conflict existed but

its extent was unknown. Appellants' certificates of location were of record at Sitka, Alaska, as appears by their own allegations (Tr. 70) thus creating a cloud on the title which is an interference with the rights of appellee. Appellants claim proof of a conflict in areas had to be made by appellee on his case in chief. Appellants made a motion for dismissal at the close of the appellee's case in chief (Tr. 326) but made the motion only on the grounds that appellee was not a citizen and that the location certificates did not tie the claims into a natural object or permanent monument. They did not question the adequacy of the proof as to the extent of the conflict. During the remainder of the trial the conflict was first identified by the witness Richelsen (Tr. 439, 440) who prepared Exhibit K which was introduced (Tr. 441) by appellants as an exhibit to show the extent of the conflict. If appellee did not establish the extent of the conflict, appellants did it for appellee as well as it could be done under the circumstances.

POINT 17.

CLAIM THAT APPELLEE DISQUALIFIED HIMSELF TO LOCATE MINING CLAIMS IN ALASKA WHEN HE VOLUNTARILY STATED HE WAS A CANADIAN CITIZEN.

Appellants do not pretend to quarrel with the decision in *McKinley Creek Mining Company v. Alaska United M. Co.*, 183 U. S. 563, 571, which holds that although the mining laws limit locations to those made by citizens of the United States (41 Stat. 437; 30 USC

Sec. 22) such locations by aliens are voidable, not void, and are free from attack by anyone except the government. They claim however that even though appellants cannot attack such locations, the decision in *McKinley Creek v. Alaska United* does not relieve the appellee of the burden of proving he is a citizen, since he located the claims and is asserting a right to have title quieted rather than being in the position of having the validity of his claims attacked. As stated by appellants in response to an inquiry by the court, "it depends upon the position of the party."

In *McKinley Creek v. Alaska United* the judgment quieted title to two claims in Alaska in favor of the plaintiffs (appellees) against the defendants (appellants) as in the instant case. There the defendants had raised the issue of the citizenship of the plaintiffs and plaintiffs had offered no proof of their citizenship making it necessary for plaintiffs to sustain their claims as aliens the same as the plaintiff-appellee herein. The court held that the location of a mining claim "when perfected has the effect of a grant by the United States of the right of present and exclusive possession" and that grantees of the public land take by purchase. The court then quoted with approval from *Doe ex dem. Goveneur v. Robertson*, 11 Wheat. 332, 6 L. Ed. 488 as follows:

"That an alien can take by deed, and can hold until office found, must now be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary."

In *McKinley Creek v. Alaska United* the appellants contended that the appellee had to show an exclusive right to the possession of the ground, although validity of the location could not be attacked by appellants. The court pointed out that the possession was one of the incidents of the location so that if the location could not be attacked by appellants, neither could an incident of that location. The same reasoning applies to the argument of appellants in the instant case. The right to maintain a suit to quiet the title is one of the incidents of the locations so that since appellants cannot attack the validity of the locations, they cannot attack the right of appellee as an alien to maintain this suit. It is a matter of substantive law and not one of procedure, but even so there is no procedural rule against aliens maintaining such suits.

The same has been held in a long line of cases, such as *Ginaca v. Peterson*, 262 F. 940, 910 (9th Cir.), wherein the plaintiff was an alien who obtained a decree quieting title to mineral lands; *Perley et al. v. Goar*, 195 P. 532, a suit to enjoin trespassers wherein the Supreme Court of Arizona held that the citizenship of the locator cannot be raised or determined in actions between private individuals wherein the government is not a party, and 58 CJS 74.

As stated in Lindley on Mines, 3rd Ed. Vol. 1, Sec. 233 P. 517:

“The lands are the property of the government. It alone has the power to object and inquire into the qualifications of the locator. ‘With regard to

the peace of society and a desire to protect the individual from arbitrary aggression' the government reserves to itself the right to inquire into these qualifications."

Appellants cite only one case in support of their position and that is a decision of this court in *Vedin v. McConnell*, 22 F.2d 753, 756. We fail to see any comfort to be derived by appellants therefrom. They claim it indicates that had Vedin still remained an unpardoned, imprisoned felon, his location while on parole would be void and not simply voidable. The court did not make any such implication. The court decided only that since Vedin had gained a full pardon after he made his location and before any intervening rights had been obtained by others, his location became perfected upon obtaining the full pardon, regardless of whether it might have been void or voidable had he not received such pardon. In other words this court did not find it necessary to decide what its holding would have been if no pardon had been granted. On the other hand, the court indicated that if no pardon had been obtained, it would have to give consideration to:

a. The fact that the suspension of civil rights during a term of imprisonment and parole on which McConnell depended, was derived from a local law applicable in Alaska but not applicable in other places, with the result that a prisoner from Alaska on parole has no civil rights while in other places he has, and if this statute is held to suspend the rights of citizens to stake mining

claims, then the mining laws with respect to citizenship, which Congress alone can regulate, would be varied in their application.

b. One of the purposes of the parole law is to help the prisoner adjust and reinstate himself in society in any honest employment and that this law "must be taken as in some measure qualifying the rule of *civilter mortuus*, we have no doubt."

Appellee maintains this dictum by the court was meant to imply that if it did not decide the point on the basis of the pardon it would have great difficulty deciding that the suspension of civil rights during imprisonment and parole in Alaska suspends the rights given all citizens to locate mining claims. We think the citations following the paragraph containing the decision in these words is particularly noteworthy, to wit:

Our conclusion therefore, is that, even though it be held that plaintiff was not competent, during the term of his sentence, to take such a grant as is implied by the location of a mining claim, upon the expiration of such term, no other right intervening, the grant became effective and related back to the date of the location. We think the principles recognized in *Shea v. Nilima* (C.C.A.), 133 F. 209, and *McKinley v. Alaska M. Co.*, 183 U. S. 563, 22 S. Ct. 84, 46 L. Ed. 331 are clearly applicable.

The above reference to the principles in the cases cited is the only part of the decision in *Vedin v. McConnell* which has any bearing on the validity of the

claims of appellee in the instant case and there is no comfort therein for the appellants.

POINT 18.

**THE JUDGMENT WAS NOT CONTRARY TO LAW OR TO
THE PREPONDERANCE OF THE EVIDENCE.**

Reviewing the testimony as a whole it is apparent that appellee and his assistant Norppa proceeded in the fall of 1952, in good faith and with determination to comply with all laws for locating and recording notice of the appellee's claims and did much more than substantially comply with the laws. In fact much more than is ordinarily done in locating claims. Neither they nor anyone else saw any evidence of any locations made by appellants in 1950 and the summer of 1952, although the witness Engdahl claimed to have brushed some lines, built some monuments and blazed corner stakes in 1950 (Tr. 516-518) on quite a few claims. The appellants had the same opportunity to prove their locations by surveys and competent witnesses to show what evidence existed on the ground as to how and where the claims were located by Mr. Pape; but they offered no evidence except these meager statements of Mr. Engdahl to support their locations whereas appellee proved by competent surveyors, a highly qualified forester, appellee and his assistant Norppa that all the acts of locating valid claims were performed.

It is apparent in reviewing the whole record that Mr. Pape recorded notices in the office of the recorder and nothing more.

It is also apparent why Mr. Pape made no effort to take the witness stand and testify as to his locations, especially after having been unable to show Mr. Harrigan in the spring of 1953 a single mining claim or any evidence of one except an old notice of the Nina claim which appellants never again mentioned, and since he so glibly revealed to Mr. Harrigan his system of locating claims without any blazed or otherwise marked lines (Tr. 665) and five posts which nobody could find although much of the country was fairly open and at high elevations was wide open. There is no evidence of any discovery by Mr. Pape or his adopting a discovery by someone else.

The court's opinion is not only supported by enough evidence on every point but is supported by an overwhelming preponderance of the evidence. It should be sustained.

Dated, Juneau, Alaska,
January 12, 1955.

Respectfully submitted,

FAULKNER, BANFIELD & BOOCHEVER,
N. C. BANFIELD,
H. L. FAULKNER,
GEORGE F. WARD,

Attorneys for Appellee.

(Appendix Follows.)

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Appendix.



Appendix

RULE 4, UNIFORM RULES OF THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, EFFECTIVE APRIL 30, 1953.

Rule 4. Interlocutory Applications — Evidence.

Upon the hearing of any application for an interlocutory order, the facts shall be presented by affidavits or other documentary evidence, unless the court upon application and cause shown shall permit oral evidence to be introduced.

No. 14,431

IN THE

United States Court of Appeals
For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE,
and AURORA NICKEL COMPANY, a cor-
poration,

Appellants,

VS.

E. MILES FLYNN,

Appellee.

APPELLANTS' REPLY BRIEF.

R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
P. O. Box 1211, Juneau, Alaska,
Attorneys for Appellants.

FILED

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PAUL P. O'BRIEN

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APPELLANTS' REPLY BRIEF.

STATEMENT OF FACTS.

Appellants tried to, and believe they did, thoroughly and correctly state the pertinent evidence in their main brief, pp. 19-48, and submit that, although Appellee's Answer thereto in his brief, pp. 2-7, ignores the actual record and the factual evidence and begs the pertinency thereof, just as the learned trial Court did in its Opinion (PR 97), reiteration thereof herein in detail is unnecessary.

ARGUMENT.

Appellee throughout his brief cursorily dismisses Appellants' points, despite by what authorities they are supported, and in some instances practically

ignores them, i.e.: he asserts in his brief, p. 36, Appellants didn't argue whether Bohemia Basin Camp is a natural object or permanent monument. Of course, it doesn't make any difference which it is, if it was either which it was not; but Appellants' brief, pp. 61-64, was devoted entirely to that subject and that an unidentified cabin couldn't be inferred, as apparently the learned trial Court did, to be the Bohemia Basin Camp.

Pape's affidavit: This affidavit of January 13, 1954 (PR 109-112), was before the trial Court with Appellants' Motion for New Trial (PR 107-109). Appellants could not present it earlier because it wasn't made until January 13, 1954. Pape said (PR 109) he was employed by the United States, Navy Department, Military Sea Transport Service and, if he had not made the trip to Korea as required by the government, he would have lost his employment and seniority privileges with the United States. Appellants submit that Pape is at least inferentially corroborated by that Service's letter (PR 87-88), which says Pape was chief electrician aboard that Service's ships.

Appellants submit that Pape's duties of employment were paramount to his personal affairs—even a law-suit—and that the trial Court should have taken judicial notice thereof. Moreover, Pape's affidavit was not controverted by any sworn evidence other than Ward's affidavit (PR 78-81), which, in the light of his deceit of the Court, should have been looked upon with askance and discredited in the exercise of reasonable discretion.

Ward did not state therein (Appellee's Bf. p. 7) that Pape told him on June 20, 1953, that he would not be a witness for Appellants. Ward said (PR 78) Pape told him he would not be witness on the trial of any such action—referring to this action which Ward said he told Pape was about to be commenced. Pape under oath denied Ward's statement and said that he was definitely interested in being a witness at the trial and had important evidence to offer (PR 110).

Misabuse of Discretion. Appellee likewise dismisses (brief, pp. 20-26, p. 25), Appellants' argument in their brief, pp. 51-56, that the learned trial court had arbitrarily and capriciously abused its discretion, and entirely ignores Appellants' cited authorities and the trial Court's forcing two of the Appellants to trial, in the absence of the third, who the Court admitted was a material witness, unless they paid unspecified costs of \$2700 (PR 88) or \$2750 (PR 154), and that even under Rule 45(e)(1), FRCP (Bf., 51) the two Appellants couldn't have subpoenaed the third Appellant to attend the trial, and the rejection of Pape's deposition (Main Bf. p. 56), and attorney Ward's talk about the case and settlement thereof with Pape in the absence of the latter's counsel (PR 53-55), and the trial Court's abuse of discretion in not reserving decision until Pape's evidence could be adduced (PR 56), and in not informing Appellants' counsel when it informed Appellee's counsel that it would deny Appellants' Motion for Continuance (Main Brief, p. 56) and in disregarding that

Appellants Vevelstad and Company did not procure Pape's absence (PR 56). All these misabuses Appellee disregards without citing a single authority, but asserts in his brief, p. 25, "The Court did not have to give one bit of credence to Mr. Ward's affidavit to arrive at the conclusions expressed by the Court." Appellants submit that Ward's affidavit (PR 78-81) was the only sworn evidence, before the trial Court when it ordered Appellants to trial, that Pape had wilfully absented himself from the trial. Appellee still makes no denial of Appellants' charge (Bf., pp. 53-54) that Ward had deceived the Court as to his status as a practicing attorney. Appellants are not interested in Mr. Ward or as to his status as an attorney, but they submit that his deceit of the Court entitles no credit to his affidavit (PR 78-81) until it is at least corroborated by other creditable evidence, which it was not. Appellee's counsel Banfield has no personal knowledge other than what occurred in Juneau, and he didn't dispute Appellants' counsel Robertson's statements as to how the latter had tried to inform him and the learned trial Court that Appellants couldn't go to trial on December 14, 1953, because Appellant Pape would be absent in the Far East.

Appellants' *written* request (PR 93) for the Court to reserve its decision until Pape's evidence could be obtained stated that he would be available about January 16, 1954, not an indefinite date as asserted by Appellee (Bf., p. 27). Moreover, Appellants' written Motion For Continuance (PR 76-78) had been

and then was before the Court with its supporting affidavits by Vevelstad (PR 82-83) and Robertson (83-87) as well as the Military Sea Transportation Service's letter (PR 87-88).

Appellee didn't corroborate his witness Harrigan.

Appellee's witness Harrigan was on Yakobi Island from 7:20 a.m. to 4:40 p.m., May 14, 1953 (PR 672), and then only, and did not go over all the claims, probably not all of any one claim, being limited to travel by snow conditions (PR 665). He testified, knowing that Pape was unavailable to contradict him. Pape in his deposition, which the trial Court rejected, refuted all of Harrigan's testimony. Strangely enough Appellee himself never testified about these purported transactions and conversations between Harrigan and Pape, although Harrigan said Flynn accompanied them (PR 653-656), and Pape also said so in his rejected deposition (PR 405-417).

Appellee says (Bf., p. 56) Harrigan and Klein were two of his witnesses who proved that the ground was open to location by Flynn, but Harrigan was not on Yakobi Island until May 14, 1953 (PR 672) and Klein not until November 25 to 28, 1953, and then only to check blazes (PR 678), whereas Appellee claims he made his locations in the fall of 1952, nor was Appellee's witness Johnson on Yakobi Island until 1953.

Appellee says (Bf., p. 5) that Johnson prepared the map, Exhibit 1. Johnson said he hadn't seen that map until it was produced in court, that it was

not complete; that the draftsmen failed to put "all the things in there," (PR 188), also that he didn't place the descriptions on the map according to location notices; didn't amend the location notices; didn't follow the location notices when they were on the ground (PR 200-201). He had said priorily it was prepared in the office (neither place where nor draftsman's name being stated) from field-notes made by himself, Stahl and Kenniston in November and December, 1953 (PR 166), Stahl having measured the greatest share of the claims helped by Breseman, Kenniston being also along (PR 197). Significantly Appellee did not call Stahl, Breseman, or Kenniston as witnesses. Also, see Breseman's affidavits (PR 114-115; 116-118), which were before the learned trial Court on Appellants' Motion for New Trial (PR 107-109, also, see PR 118).

Appellants nowhere claimed that they relocated their claims in 1952, as stated by Appellee (Bf., p. 5). They proved that they made amended locations in June, 1953 (PR 540-543; Appellants' Exhibit J).

Appellants did not gamble, as asserted by Appellee (Bf. 9), that the trial would not occur on December 14 or 15, 1953, but commenced on October 2, 1953, to inform the trial Court and Appellee's counsel and thence forward at various times that they could not go to trial on December 14, 1953, because Appellant Pape, a material witness as admitted by the learned trial Court, could not be present at that time (Main Bf., 14-19).

Appellee took Pape's deposition for discovery purposes; in fact, the learned trial Court erroneously ruled it was inadmissible on that ground (PR 99). Appellants could not properly on cross-examination therein develop their case in chief. Moreover, that deposition was taken nearly a month before Appellants were surprised by the trial Court, over their objections that Appellant Pape would not be available and could not be in attendance, setting the case for trial on December 14, 1953.

Appellants Vevelstad and Company could not subpoena Appellant Pape under Rule 45(e)(1), FRCP, as stated (Main Bf., p. 51).

It should be noted that Vevelstad testified he checked and found all of Pape's claims, also on the ground all of Pape's discoveries which he had made (PR 564).

Appellee dismisses in his brief, p. 57, Appellants' contention that the learned trial Court failed to require Appellee to sustain the burden of proof (Appellants' Main Bf., pp. 79-82), saying "There is nothing in the Court's opinion (PR 97-106) from which it can be inferred that the Court did not then thoroughly understand the burden of proof was on appellee." Appellants have no clairvoyance to know the learned trial Court's "understanding", but they submit that its Opinion and the entire record and factual evidence show that it placed the burden of proof upon Appellants, not upon Appellee as it should have.

Strength of Title: Appellee similarly dismisses (Bf., pp. 59-60), without citation of any authority and in entire disregard of the factual evidence, including Vevelstad (PR 540) and Harold Hofstad (PR 488-489), Appellants' contention (Main Brief, pp. 79-82) that the trial Court did not require Appellee to rely upon the strength of his own title. Three of his referred to witnesses were apparently Johnson, Harrigan, and Klein, none of whom were on Yakobi Island until 1953, some 6 months or more after Appellee's alleged locations. To paraphrase Appellee, it is absurd and ridiculous to contend that a person can go into a wilderness, forested, mountainous country like Yakobi Island and honestly testify that any particular area was open to location as a mining claim six or more months before he arrived on the scene.

In any event, as Appellee apparently concedes, he had the burden of proof, and also he was obliged to rely on the strength of his own title, so it doesn't make any difference what title Appellants had inasmuch as Appellee failed to prove he had title or was even qualified to locate mining claims in Alaska.

Without citation of authority, Appellee dismisses (Bf. pp. 60-61) Appellants' contention that Appellee should have been required to prove the extent of conflict between Appellants' claims and his claims (PR 720). Appellee alleged the conflict without describing it in his complaint (PR 7) and in his Amended Complaint (PR 60), nor did he ever prove it. Appellants still don't know, except by the trial Court's

erroneous decree (PR 119-122), with which of Appellee's purported claims their claims conflict.

Appellee ignores (Bf., pp. 61-66) Appellants' contention, not that they have the right to attack Appellee's non-American citizenship, but that he voluntarily, for some unknown reason, disqualified himself to locate and hold title to mining claims in Alaska by volunteering, not at Appellants' suggestion or question, that he was a Canadian citizen (PR 265).

Appellants never have contended, and they don't now, that they can affirmatively challenge Appellee's non-American citizenship, but they do contend that when Appellee himself voluntarily proved he is a Canadian citizen, he thereby disqualified himself as being able to locate and hold the title to mining claims in Alaska, and that this Honorable Court's decision in *Vedin v. McConnell*, 22 F. 2d 753, 758, supports that conclusion.

Appellee summarily dismissed (Bf. pp. 66-67) Appellants' contention (Bf. 85) that the judgment was contrary to the law and the preponderance of the evidence, but ignores all of Appellants' evidence, including Vevelstad's (PR 564) that he checked and found all of Pape's claims, also all of Pape's discoveries which he had made on the ground.

Appellants submit that their main brief sufficiently answers Appellee's other points, and that to discuss all of Appellee's fallacious arguments and inattentions to the actual record and factual evidence would indefinitely lengthen this reply.

Wherefore, Appellants submit it and their main brief in support of their contention that their points are meritorious and that the learned trial court did commit the many instances of arbitrary and capricious misabuses of discretion as they contend and that the judgment should be reversed and set aside and Appellee's action dismissed.

Dated, Juneau, Alaska,

February 22, 1955.

R. E. ROBERTSON,

ROBERTSON, MONAGLE & EASTAUGH,

Attorneys for Appellants.

No. 14,431

IN THE

United States Court of Appeals
For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE,
and AURORA NICKEL COMPANY, a corporation,

Appellants,

vs.

E. MILES FLYNN,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Seward Building, Juneau, Alaska.

*Attorneys for Appellants
and Petitioners.*

FILE

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PAUL P. O'BRIEN, CL

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APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellants ask for rehearing because they believe the Court in its Opinion of January 13, 1956, overlooked several salient meritorious points presented by Appellants' Appeal or else did not give those points such consideration as they were entitled to under the law and the evidence of the case.

I.

The Appellants consist of three different defendants: the individuals S. H. P. Vevelstad and William Pape, and the corporation Aurora Nickel Company. The latter was the owner (PR 68) at the time of the

trial of the mining claims against which Appellee seeks to quiet his alleged title. The Judgment ran against all three appellants (PR 119).

The record contains no evidence that either Vevelstad or the Aurora Nickel Company procured the absence of Pape, which is an essential element under Rule 26(d)(3)(2), FRCP.

The record is also bare of evidence that either Vevelstad or Aurora Nickel Company had opportunity to subpoena Pape. Appellee admitted that Vevelstad would testify that he and Aurora Nickel Company did not procure Pape's absence and that Appellee had no testimony to contradict that evidence (PR 342). These facts are also persuasive that the trial Court abused its discretion in denying Appellants' request that decision be deferred until Pape's testimony could be obtained, the granting whereof was clearly authorized under Rule 52, FRCP.

Hernberg v. Tipton, 133 F2d 67, 69 (CCA, Ill. 1943);

George v. Lyons, 110 F.Supp. 711, 713, 14 Alaska, 241, 244.

Thus Appellants and Aurora Nickel Company, although innocent of Pape's absence, were deprived of an opportunity to adduce Pape's evidence (PR 109-112) in support of their interests (PR 68, 71).

II.

The Judgment (PR 119-122), which has been affirmed, entirely ignored the trial Court's finding in its Opinion that the descriptions of Appellants' three

Beach Claims were sufficient (PR 101); but, quieted Appellee's title as against all of Appellants' claims including those three claims (inasmuch as the Judgment did not except them), with which Appellee admitted his claims conflicted (PR 290).

While the trial Court found the description of the three Beach claims to be sufficient, yet it held them with Appellants' other claims to have been vacant, unappropriated, and open to location by Appellee in October and November, 1952 (PR 103-104). [Appellants' claims numbered 27 (PR 68), not 26 (PR 104).]

Patently the trial Court's reasoning and finding was erroneous in sustaining Appellee's first contention as to Appellants' three Beach claims (PR 103-104; 99).

III.

The trial Court held that Appellants' assessment work was invalid because done outside the claims purportedly for the benefit of non-contiguous claims (PR 104). The only assessment work required to be done by Appellants to maintain the validity of their claims, which were located in October, 1950, as against Appellee's claims which allegedly were located in October or November, 1952, was for the assessment year ending at noon of July 1, 1952.

Trail work is valid assessment work.

Morrison's Mining Rights, 16th Ed., p. 115.

“The kind or character of work is immaterial if it be of sufficient value and done in good faith

and tends to develop the claim. It may even be outside the boundaries of the claim; a road or trail, required for the purpose of working the claim, though outside the lines of location, would constitute representation to the extent of the value necessarily contributed towards its construction by the locator."

Emery's Miners Manual, 2d Ed., p. 49;

Walton v. Wild Goose Mining Co., 123 F. 209;

Anvil Hydraulic, etc. Co. v. Code, 182 F. 205.

The cited evidence also shows other work done for that assessment year.

The record is replete with uncontradicted evidence that both Appellee and Appellants used that trail in order to gain access to Bohemia Basin. Pape's deposition, Exhibit D (PR 382-393), would have shown, had it been admitted in evidence, the amount of trail work he did for the assessment year ending at noon July 1, 1952. His verified proof of labor dated July 8, 1952, Defendants' Exhibit F, which is prima facie evidence under Sec. 47-3-55, ACLA 1949, of the performance of the work or of the making of the improvements therein stated, shows the assessment work he did for the assessment year ending at noon July 1, 1952. While some of this trail work was done outside the claims, all of it was necessarily done, necessarily all of it benefited all of the claims, and was reasonably calculated to lead to the extraction of ore.

Appellants' Exhibit H is also prima facie evidence of the performance of the work done and of the making of the improvements therein stated for the assessment year ending noon July 1, 1953.

IV.

While the trial Court stated that the descriptions in Appellee's location notices were such as to make doubtful whether they were sufficient, yet it held that the question of the sufficiency of those descriptions was really not involved because such objection is available only to a subsequent locator, citing *J. E. Riley Inv. Co. v. Sakow*, 9 Alaska 427, 434, 110 F2d 345.

The *Riley v. Sakow* decision was based upon Chapter 10, Session Laws of Alaska 1915, which was repealed by Chapter 64, Session Laws of Alaska 1931. Appellants submit that the lower Court therein did not hold that under that act abandonment or forfeiture could be asserted only by a subsequent locator or by a relocater but simply said that the 1915 legislature made abandonment nothing more than a defense. This Honorable Court in 110 F2d 345 did not pass upon this point.

Furthermore, a placer claim was involved in the *Riley v. Sakow* case, whereas here lode claims are involved. That decision was based upon Section 2 of Chapter 10, SLA 1915, which pertained to placer claims only. Sections 10 to 15 of that act pertaining to lode claims did not contain the same provisions as those pertaining to placer claims, but Section 15 did provide that a locator or claimant might amend his location, and Section 21 specifically provided that, should the locator fail to comply with any of the provisions of Sections 10 to 21 of the act, the burden of proof would be upon him to show compliance with the provisions of said sections.

While some technical distinction may exist between an amended location and a relocation—(This Honorable Court in its Opinion even referred to Appellants' June, 1953, locations as relocations by saying "As defendants purportedly relocated 20 of their claims on various days in June, 1953, filing amended location certificates July 6, 1953'")—yet it is not such as to justify the harsh construction given by the trial Court following a decision based upon a statute long since repealed.

The mining laws of the United States covered the claims involved in this case, under Title 48 USCA 381, including the local territorial provisions as to location of a lode claim (§47-3-31, ACLA 1949) and recording of a certificate of location (§47-3-33, ACLA 1949) and the provisions of §47-3-34, ACLA 1949, which reads:

"§47-3-34. Amended locations: Amendment of notices and change of locations: Filing amended certificate of location. Notices may be amended at any time and monuments changed to correspond with the amended location but no change shall be made which will interfere with the rights of others. Whenever monuments are changed or an error has been made in the notice or in the Certificate of Location, an amended Certificate of Location shall be filed for record in like manner and with like effect as the original Certificate. (L 1933, ch 83, §5, p. 162; CLA 1933, §358.)"

Appellants admit that amended locations cannot be made to interfere with or injure the intervening right of another nor can a relocation; but, they submit that

in defense of their amended claims they had the right to show that the intervening person (Appellee) had no valid right, which Appellants sought to do by showing and proving that Appellee's claims were not located nor Certificates of Location thereof made as required by the foregoing statutes.

In June, 1953, as shown by Appellants' Exhibit J, the Appellant Aurora Nickel Company made amended Certificates of Location of the Rita 1, Rita 2, Rita 3, and Rita 4, Doris 1 and Doris 2, and Hope 1, Hope 2, Hope 3, Hope 4, Hope 5, Hope 6, Hope 7, Hope 8, Hope 9, Hope 10, Hope 11, and Hope 12, Sverre, and Sverre No. 2, and located Sverre No. 3 (PR 544) constituting 21 of the 27 claims owned by Appellant Aurora Nickel Company.

Despite these amended Certificates of Location, including one original Certificate of Location, the trial Court by its Opinion (PR 97-106) and its Judgment (PR 119-122) quieted Appellee's title as against all of them upon the theory that their descriptions were insufficient and that their amended locations gave them no standing to show the defects in Appellee's locations and purported Certificates of Location.

V.

In denying Appellants' motion for new trial (PR 107-109) the trial Court entirely ignored the newly discovered evidence disclosed by Peter Brown's Affidavit (PR 113-114) and John Breseman's Affidavits (PR 114, and PR 116-118). No contradiction was made that these facts were newly discovered. The

rules specifically authorize a new trial upon the ground of newly discovered evidence. Rule 59(a), FRCP.

Appellants believe this Honorable Court in its Opinion overlooked the merits of their motion for new trial, and that Breseman's testimony might well have changed the result of the trial.

Tracy v. Terminal R., etc., 170 F2d 635;

Murdock v. U. S., 160 F2d 358;

Sulzbacher v. Continental Casualty Co., 88 F2d 122.

VI.

The entire tenor of the trial Court's Opinion (PR 97-106) shows that contrary to law it placed the burden of proof upon the Appellants instead of upon the Appellee.

While the trial Court first set forth plaintiff's contentions (PR 99) he did so seemingly only for the purpose of then considering and disposing of Appellants' defense or title; in fact, after having disposed of Appellants' claims he then continued that the next question for determination is the validity of Appellee's 45 claims (PR 104) and proceeded, as stated, to hold that Appellants could not attack Appellee's claims for insufficiency of description because such objection was not available to Appellants (PR 105).

The authorities are unanimous that the burden of proof was upon Appellee, not upon Appellants; in fact, Appellee having failed to prove a valid title,

actually made it unnecessary for Appellants to offer any defense whatsoever.

Patton on Titles, p. 917.

Appellants' Brief, p. 81.

VII.

Appellants urge that their testimony as to the damages they suffered by reason of Appellee's acts was not wholly frivolous and wanting in substance. We submit that Appellant Vevelstad's testimony was neither frivolous nor insubstantial. He stated that the United States Government through the National Production Authority on October 14, 1952, was ready to finance a plant and that they were waiting now to move in, and that under that Authority he could have put in a plant to mine and concentrate the ore, which would have been shipped south in the form of concentrates, and that he had people ready to proceed under the National Certificate of Authority but that Appellee's actions had clouded Appellants' title and the people quit, and that the plant would earn annually \$60,000,000 per year, of which his share alone would be around \$8,000,000 annually in addition to 25% of the profits and that he was dealing with one of the biggest engineering firms in the United States and that he had an agreement in October, 1952; also that he based his exemplary damages upon the principle that punitive damages for violations of the Anti-Trust Law were computed at three times the actual damages (PR 545-550), also that on July 10, 1952, an engineer representing buyers investigated the property (PR 573).

None of this testimony was contradicted. It was ample and good proof of the amount of damages in accordance with Rule 8(d) FRCP, which had not even been denied by pleading. Appellants again urge that their counterclaim was a compulsory counterclaim under Rule 13(a) and arose out of the transaction or occurrence that is the subject matter of Appellee's claim (Amended Complaint, PR 53-61), and had they not pleaded it herein they would have been precluded from doing so in an independent action.

Lesnik v. Public Industrials Corporation, 144 F2d 968 (CCA NY 1944);

Penn. R. Co. v. Musante-Hillips, Inc., 42 F. Supp. 340 (DC Cal. 1941).

Appellants submit that their Counterclaim denominated as such required a Reply, Rule 7(a), supra, or else stands admitted under Rule 8(d).

U. S. v. Hole, 38 F.Supp. 600 (DC Mont. 1941);

Porter v. Theo J. Ely Mfg. Co., 5 FRD 317, (DC Pa. 1946);

Sun-Maid, etc., Assn. v. Neustadter Bros., 115 F2d 126, 127 (CCA Cal.);

Peters & Russell v. Dorfman, 188 F2d 711, 713, (USCA 7).

VIII.

While Appellants realize that under the United States mining laws a lode claim is subject to no specific dimensional qualifications other than it must not extend along the lode for more than 1500 feet or more than 300 feet on each side of the lode, with end

lines at right angles to the lode line and parallel to each other, yet they submit that the evidence clearly shows that Appellee's claims were not located according to those requirements, and could not possibly have had common side lines or common end lines or constituted a block around which one perimeter could be run because they were staggered as shown in Appellants' Exhibit L, an illustrative map made by Mining Engineer Richelsen, who stated he had made his illustrative map from Appellee Flynn's Answer (Appellants' Exhibit B), to Appellants' Interrogatory No. 9 (PR 22-25).

Witness Arthur Hofstad testified somewhat indefinitely on the subject (PR 502). Witness Arnold Hofstad testified that the notices were all placed very close together, and that he would say within a distance of 2,000 feet he encountered at least four notices, and he had the impression that they were parallel to the rim and his recollection was that they were either Norpa's or Flynn's notices (PR 488-491). Appellant Vevelstad testified that he found eight of Flynn's notices bunched together in a string 1400 feet long, that they were staggered notices (PR 525-526), and that with a heavy trolling line he measured eight claims and they actually covered 1400 feet (PR 538-540); and that Appellee's claims only had a discovery post, no end or corner posts.

IX.

Appellants respectfully urge that, if the Appellee's Pelican No. 30 Mining Claim's description of

“50 feet east of the mouth of Bohemia Creek” is sufficient (Op. herein, p. 8), necessarily a description of “2 miles westerly from the mouth of Bohemia Creek and Tidewater” is equally sufficient.

Appellants’ 17 locations (Exhibit E) are all, with the exceptions hereinafter noted, tied in not only by distance and course from the mouth of Bohemia Creek, but also from Tidewater, and furthermore are tied in by distance and course from the Miner Island.

The word “line” in the location notice would not confuse any person, because a sight on “Miner Island” would show any intelligent person that the course ran from Miner Island. A line on Miner Island would necessarily lead to a course from Miner Island.

Exceptions: Rita No. 1 notice does not state the distance from Miner Island line. Hope Nos. 1, 2 (word “line” not in notice), 3, 4, 5, and 6 do not state the compass course from the mouth of Bohemia Creek and Tidewater. However, for example Hope No. 1, a line projected 4 miles southerly from Miner Island would necessarily intersect, when it reached a point $2\frac{1}{2}$ miles distant from the mouth of Bohemia Creek and Tidewater, a line projected westerly from the mouth of Bohemia Creek and Tidewater.

Appellants submit that the stated courses given in those notices would govern and cure ambiguous courses under general principles of construction of descriptions in conveyances.

Steen v. Wild Goose M. Co., 1 Alaska 255, 266;
Sec. 58-7-3, ACLA 1949;

Lindley on Mines, 3rd Ed., Vol. 2, §§ 381, 382.

Appellants further urge that Exhibits K, 1, 6, and 7 don't control either Appellants' or Appellee's notices, but that the descriptions in the notices control those maps, and that the description in Appellants' Hope No. 10 claim, despite Richelsen's testimony (PR 457), is precise, and is more precise than that of Appellee's Pelican No. 30 claim, and that he was correct when he stated (PR 440) the claims were platted on Exhibit K from the location notices.

The variation of a course from a particular discovery post would not make the description insufficient. Such requirement would require a prospector to make an accurate survey before he could locate his claim. Appellants don't have available copies of Appellee's notices, except Mayflower No. 2 and Portia No. 3 (Exhibit 2) and Pelican No. 26 (Exhibit 3), each of which shows a specified distance by a general compass direction from Bohemia Basin Camp of the claim itself, not of any particular post or part of the claim. Appellants' recollection is that Appellee's other descriptions are so tied in. The description of Pelican No. 30 as "located 50 feet east of the mouth of Bohemia Creek" (This Court's Op. p. 8) indicates a similar general description.

Five of Appellants' locations (Exhibit I) are described by course and distance not only from Rock Point light, a U. S. Coast & Geodetic Survey navigational aid, but also from the north side entrance of Stag Bay; one by course and distance not only from Miner Island but also from the mouth of Bohemia Creek; three by course and distance not only from

the Rock Point light but also from the mouth of Bohemia Creek.

The Original notices (Exhibit J) are on file with this Honorable Court, but Appellants' records show that 20 of them are described by course and distance not only from the tunnel (Picture shown in Exhibit O, which Vevelstad identified [PR 697-698], the tunnel being on the Hope group [PR 536]), on east side of Bohemia Valley but also from the outflow of Bohemia Creek in Lisianski Straits, except four of them state the claim is on top of Takanis Mountain and describe the tunnel as being on the Hope Nickel group instead of on the east side of Bohemia Valley but they also tie in by course and distance from the outflow of Bohemia Creek.

Appellants submit that lines projected according to these descriptions would intersect the claims.

Appellants do not have available a copy of Sverre No. 3 original certificate of location so make no comment relative thereto.

X.

Johnson, the man who testified he met Pape and a man with an ax (PR 586), was not a U. S. mineral or land surveyor (PR 174-175). He said he was on the ground in May and June, 1953, merely making observation of claims and taking pictures (PR 184), when snow conditions made travel dangerous (PR 205-207). Harrigan also testified as to snow conditions in May, 1953. While stating there was some 12 to 14 inches of snow around the cabin (PR 675),

Vevelstad testified that Harrigan told him there was 5 feet of snow around the cabin (PR 698). Appellants' Exhibits N and O show the timbered, mountainous terrain of Bohemia Basin (PR 696-698). Vevelstad described it as the toughest country in the world (PR 528-529). Appellants submit that this Honorable Court can take judicial notice of Yakobi Island's topography, geography and terrain. These all disclose how little observation Johnson could have done in the few days he was on the Island in May, 1953, of posts and monuments. Nor does the record disclose, as Appellants recall, any evidence that plywood employee Klein examined any blazes which were identified as having been made by Pape.

Johnson himself did not make the map, Exhibit 1 (PR 166); in fact, he admitted he hadn't seen it until the morning he testified (PR 187). It was not complete (PR 188).

He stated that the claim descriptions were not placed on that map according to the location (notice), but according to survey (PR 193). He said those locations were not amended (PR 193-194). Appellee offered in evidence only one set of location notices, which under Johnson's testimony are not the claims on the ground.

Furthermore, Appellee's claims do not give their width, and the claimed discovery was not within the claim but on the end line. Vide: Notices location Mayflower No. 2 and Portia No. 3 (Exhibit 2) and Pelican No. 26 (Exhibit 3).

The language "discovered, located and claimed 1500 feet, horizontal measurement of, on and along the lode or vein . . . , with 300 feet of surface ground on each side of the center line of said claim," does not denote that the claim is any particular distance in either length or width. If it does, nothing is accomplished by later stating in a notice that the claim extends 1500 feet in some stated direction each way from discovery.

Appellee's sworn Answer (PR 22-25) (Exhibit B, PR 308) tried to avoid the plain fact stated in his location notices by testifying that in many of his claims discovery was immediately adjacent to the center end post. He said discovery on Mayflower No. 2 was about 5 feet Southeast of the northwest center end post. Mayflower No. 2 location notice (Appellants' Bf. Appen. p. 78) states the claim extended 1500 feet northwest from the discovery monument. Hence, if his notice is correct, then his sworn answer is incorrect. In the notice the claim runs 1500 feet northwest from discovery. If his sworn answer is correct, then the notice is incorrect because, if 1500 feet long, it must have run 1495 feet southeast and 5 feet northwest from discovery, whereas it says it runs 1500 feet northwest from discovery. If the claim ran 1500 feet northwest from discovery, and discovery was at the point indicated by Appellee's sworn answer, then the claim extended 1495 feet further to the northwest than indicated by the notice, and 1495 feet of open ground exists which throws off that entire line of claims. Both sworn answer and notice can't be correct.

Therefore, Appellee failed to prove his case because at the time of the trial he had recorded neither notices nor certificates of location correctly describing his claims as required by Sec. 47-3-31 and Sec. 47-3-33, ACLA 1949.

Sec. 47-3-33, ACLA 1949, also provides that failure to record a certificate of location within 90 days of posting location constitutes an abandonment.

This Honorable Court's construction of the former law, Sec. 2, Ch. 10, SLA 1915, should be applied here.

Veedin v. McConnell, 5 AFR 394, 401, 22 F2d 753.

Inasmuch as Appellee thereby failed to sustain the burden of proof as to his title and to prove that he had located his claims in accordance with Sec. 47-3-31 and 47-3-33, ACLA 1949, it is immaterial in this action whether Appellants did not blaze or mark until 1953, which they do not concede, the boundaries of their claims.

Because, the requisite acts of locating a mining claim need not be done at any specified time but can be done at any time prior to another's obtaining rights to the ground embraced in the claim.

"The failure to perform any of the given acts within the time limited by the laws or local rules may subject the ground to relocation; but, if the requirements are complied with prior to the acquisition of any intervening rights, no one has a right to complain."

Lindley on Mines, 3d Ed., Vol. 2, p. 755, §330;
Reeden v. Harlan, 2 Alaska 402, 404.

The only materiality herein of Appellants' failure to properly locate their claims prior to October and November, 1952, which as stated they do not concede, is that they are required to establish good title to their claims before they can recover damages from Appellee on their Compulsory Counterclaim and if they do not so establish it they cannot recover those damages.

Dated, Juneau, Alaska,
February 20, 1956.

R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
*Attorneys for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay and that it is meritorious because this Honorable Court in its Opinion of January 13, 1956, inadvertently overlooked principles of law applicable to this proceeding as well as pertinent evidence disclosed by the record herein.

Dated, Juneau, Alaska,
February 20, 1956.

R. E. ROBERTSON,
*Of Counsel for Petitioning
Appellants.*

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No. 14,450

**United States Court of Appeals
For the Ninth Circuit**

GEORGE W. LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

JAMES E. BURNS,

111 Sutter Street, San Francisco 4, California,

Attorney for Appellant.

FILED

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**PAUL P. O'BRIEN
CLERK**

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No. 14,450

United States Court of Appeals For the Ninth Circuit

GEORGE W. LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

Appellant was found guilty by jury verdicts after trial in the United States District Court for the Northern District of California, Southern Division, of three violations of Section 145b of Title 26 U.S.C.A. Appellant was sentenced to a term of one year imprisonment on each count, the sentences to run concurrently and to pay a fine of \$8,000.00 on each count. (T.R. 18-19.) Notice of appeal was timely filed. (Rule 37 (a) Federal Rules of Criminal Procedure.)

The jurisdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C. Sections 1291, 1294.

STATEMENT OF THE CASE.

Appellant was indicted in the United States District Court for the Northern District of California, Southern Division. The indictment was in three counts. (T.R. 3-6.)

Each count charged a violation of Section 145 (b) of Title 26 U.S.C.A. The first count charged that the defendant on January 15, 1948, did wilfully and knowingly attempt to defeat and evade income taxes owing to the United States for the year 1947 by filing a false and fraudulent income tax return. This count alleged that he understated his income in the amount of \$187,817.22 and that he asserted only \$2,018.10 in taxes was due when the amount due and owing was \$145,761.90.

The second count alleged a charge of wilful evasion in the same year as the first count by the filing of a false return on behalf of the defendant's wife. In connection with her return it is alleged that the understatement of income was \$185,757.38. The tax due was \$146,189.40, and the return showed only \$2,884.55 in taxes due and owing.

The third count alleges a violation of the same statute involving income and taxes for the year 1948. It alleges a wilful attempt to defeat and evade taxes by the filing of a false and fraudulent joint return of the defendant and his wife; that the return set forth an income of \$115,153.06 and a tax due of \$53,113.62 while the true income was \$308,099.51 and that the tax thereon was \$199,834.82.

Motions to dismiss the indictment and for a bill of particulars were filed, argued and denied. (T.R. 7-16.) Thereafter the defendant entered his plea of not guilty to each count of the indictment (T.R. 16, and the case was tried before a jury. At the conclusion of the government's case the appellant made a motion to strike all of the testimony and evidence relating to the net worth and expenditure computations advanced by the government. (T.R. 559.) Likewise, pursuant to Rule 20(a) of the Federal Rules of Criminal Procedure a motion for a judgment of acquittal was made. (T.R. 559.) Both these motions were denied. (T.R. 559.)

The defendant introduced evidence on his behalf and testified. Rebuttal testimony was offered by the government. At the conclusion of all the evidence in the case another motion for judgment of acquittal was made and denied. (See Stipulation re Minute Order May 12, 1954, on file herein.)

The jury returned a verdict of guilty on each count. (T.R. 16.) The motion for judgment of acquittal was renewed and in the alternative a motion for a new trial was made. Both motions were denied. (T.R. 17.) The defendant was sentenced to one year imprisonment and a fine of \$8,000 on each count. The terms of imprisonment were ordered to run concurrently. (T.R. 18-19.) A timely notice of appeal was filed. (T.R. 20.)

The transcript of record consists of approximately 950 pages. The theory upon which the government

based its case was the so-called "net worth and expenditures" method. It contended that expenditures in excess of reported income for the two years in question constituted the measure of unreported income for those years. The defendant contended that all of his income and that of his wife for the two years in question was properly reported and that expenditures in excess of reported income came from accumulations in prior tax years.

The evidence discloses that the defendant, who will be 65 years of age this year was born and raised in San Francisco. Starting with the year 1904 he began an association with horse racing, that continued in various capacities until the year 1948. (T.R. 613-651.) For many of his adult years he engaged in the business of "book-making" at various race tracks throughout the United States and in Canada and Mexico. For the two years mentioned in the indictment and for some years prior thereto he had been an official of the Detroit Racing Association acting in various capacities and for the year 1948 was general manager and president.

The government proceeded to attempt to prove a case of wilful evasion by showing a series of expenditures by the defendant in excess of his reported income for the two years in question. Its attempt involved the testimony of 35 witnesses and a series of stipulations both oral and written, dealing with the amount of money expended by the defendant in the two years in question.

As is customary the prosecution offered in evidence the original tax returns of the defendant and his wife for the year 1947 and their joint return for the year 1948. (Exs. 4-5-6, T.R. 30.) Immediately the prosecution thereupon placed in evidence, without foundation, and over the defendant's objection, a document purporting to show that the defendant was liable for taxes for the year 1933 arising from a liability transferred from another separate taxable entity. (Ex. 10, T.R. 34.) The government then offered a series of documents and testimony of two government officials, all over the objection of the defendant, relating to an effort to compromise such tax liability, terminating with an offer in compromise which was finally accepted in 1941. (T.R. 72, Ex. 14F.)

The offer so accepted was in the sum of \$1,500.00 in settlement of a transferee liability of approximately \$4,000.00. The deficiency was for unpaid excess profit taxes of an insolvent corporation of which the defendant had been an officer.

The government produced a series of witnesses, altogether 35, who testified as to various financial transactions they had with the defendant, or that they recorded as accountants for enterprises in which the defendant invested or identified other records. In addition numerous stipulations both oral and written were introduced into evidence concerning the fiscal affairs of the defendant. This testimony covered the years 1941 to 1948 and was introduced into evidence over the objection of the defendant.

The gist of the government's case was that for the two years in question the defendant had spent more than he had reported as income. Exs. 61, 62 and 63 (T.R. 467 and 494) were admitted in evidence, over the objection of the defendant, such exhibits comprising a summary by the government agents of funds available and funds spent for the period 1942-1948, by the defendant. For the convenience of the Court such exhibits are reproduced as an appendix to this brief and bear the same exhibit number as marked by the trial Court.

In short the prosecution's case consisted of showing that money was spent in excess of reported income over a seven year period, amounting to \$832,993.06. (Appendix Ex. 62.) The government did not attempt to show either for the year 1947 or the year 1948, the two years with which the defendant was charged with wilful evasion of taxes, any of the following:

(1) That the records from which his tax returns were prepared were inadequate for that purpose;

(2) What the net worth of the defendant was at the beginning of both those years; or

(3) That the defendant had a source of income for those years other than that reported.

The government's chief witness who prepared the exhibits attached hereto and made the investigation in this case was Special Agent Klass of the Internal Revenue Service. (T.R. 456.) He explained the theory under which this prosecution proceeded, as follows (T.R. 464-465):

“Well I attempted to reconstruct his income for each of those years telling his actual income by the net worth method or an outgrowth of the net worth method called the source and application of funds method.”

The government produced as its witness one William Anater who testified that he had prepared the three income tax returns that were the subject matter of this indictment. (T.R. 227-229.) On cross-examination he testified that he had records furnished to him by the defendant or others on the defendant's behalf from which he obtained the information which he inserted in the returns. (T.R. 298-299.) For the year 1948 an item of \$43,198.44 being the so-called book profit of a partnership was not included in the appellant's return for that year. This witness on direct examination explained that he was the one that determined that the items should not be shown in that return. (T.R. 238-242.) Records which were introduced into evidence consisted of books of account of the various enterprises regularly maintained by accountants. The partnership transaction was fully disclosed on the books of account of this partnership and the witness testified that for technical accounting reasons the items should not be shown on the return of the defendant.

Only two witnesses testified as to a possible source of income to the defendant other than that reported. Earl Beasley, a government witness, testified that in the year 1947 or 1948, he was not sure which, the defendant had told him that he the defendant had

lost \$125,000.00 betting on a horse owned by the witness. (T.R. 370.) It might not be inappropriate to point out that the government stipulated during the course of the trial that during 1947 and 1948 the defendant had loaned this witness \$104,000.00. (T.R. 383, Ex. 57, Appendix Ex. 62.) The defendant sued to recover the loan in the United States District Court in Nebraska. (T.R. 384.) The deposition of this witness was taken prior to that trial and he stated that he had not gone to any safe deposit box with the defendant nor did he make mention of a \$125,000.00 bet. After the appellant herein had testified at that trial the witness for the first time related the bet of \$125,000.00. (T.R. 402-408.)

The other witness from whom the government sought to obtain testimony concerning a possible source of income was William C. Gaskill. He testified that in 1947 or 1948, he couldn't remember which, (T.R. 358) he heard the defendant request another party present to make a bet on a horse in the amount of \$15,000.00; that he did not know if the bet was made; that he did not see the defendant give any money to the other party (T.R. 359); but that two or three hours later he saw the defendant give such party a paper bag. (T.R. 360.)

The defendant took the stand on his own behalf. He testified as to his various activities in the racing world covering almost 50 years. He testified that as a result of bookmaking activities throughout the United States he had acquired \$1,000,000.00 in currency by the year 1930, (T.R. 631), and that this

money was kept in several different suitcases. Several witnesses corroborated the defendant's testimony in this respect. Each of them testified to his having large sums of currency prior to 1941, the so-called starting point of the government's net worth calculations.

The first was the government's witness John T. Laird. He had been examined extensively by the government with relation to numerous financial transactions he had with the defendant commencing with the year 1942 through 1948. (T.R. 408-425.) Upon cross-examination it was sought to elicit information concerning a financial transaction in 1941. (T.R. 427-428.) The government's objection on the ground that such questions were beyond the scope of the direct examination was sustained. (T.R. 428.) The Court required the defendant to make the witness a defense witness after an offer of proof. (T.R. 430-432.)

The witness testified that in the year 1940 or 1941 the appellant offered him \$100,000.00 in currency to negotiate the purchase of the San Diego baseball club. (T.R. 435.) The defendant's wife testified that in the year 1928 the defendant was possessed of currency which he kept in a suitcase. (T.R. 563.)

Likewise the witness Normile testified to the defendant's possession of large amounts of currency in the years 1927-1928-1929 and to his earnings as a bookmaker. (T.R. 581-605.) Also a deposition of a witness John Geddert was read (T.R. 580) concerning currency in the possession of the defendant at

times prior to 1941. The original deposition was transmitted to this Court as an exhibit.

The defendant likewise testified that in the early 1940's an agent of the Internal Revenue Bureau called upon him and that he offered to allow him to count the money in the suitcase. (T.R. 723.) The agent was not called as a rebuttal witness by the government.

SPECIFICATION OF ERRORS RELIED UPON.

1. Insufficiency of the evidence to establish the charges or to support the verdict and/or judgment of the charges contained in the indictment.

2. That the District Court and the judge thereof erred in denying appellant's motion for judgment of acquittal made at the conclusion of the plaintiff's case.

3. That the District Court and the judge thereof erred in denying appellant's motion for judgment of acquittal made at the conclusion of the presentation of all of the evidence in the case.

4. That the verdicts were contrary to the weight of the evidence.

5. That the verdicts and each of them were not supported by substantial evidence.

6. The Court erred in admitting in evidence on behalf of the government all of the Exhibits and testimony to which objection was made by the appellant and over the objection of appellant.

7. The Court erred in permitting the government to proceed to attempt to prove the allegations of the indictment by the application of the so-called "net worth" theory of proof.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

There is no competent evidence from which a jury could conclude that there was a wilful attempt to defeat or evade income taxes for the two years in question. The only basis on which the verdicts could be explained, but not sustained, was that the defendant spent more money than he reported and therefore he was guilty.

2. THE GOVERNMENT FAILED TO PRODUCE EVIDENCE OF A WILFUL ATTEMPT TO EVADE INCOME TAXES FOR THE TWO YEARS NAMED IN THE INDICTMENT.

Specifications of error Nos. 1 to 7.

All of the specifications of error may be considered under this one heading because they all expose the fatal flaw in the government's case. There was no evidence of a wilful attempt to defeat or evade income taxes as charged in this indictment. Faced with this fact the prosecution proceeded on its version of a so-called "net worth" method of proof. This method of proof did not attempt to follow the somewhat nebulous criteria established by the Courts heretofore concerning the net worth cases which criteria

are presently under the scrutiny of the Supreme Court.

See the following:

Goldbaum v. United States, 204 F. (2d) 74 (Cir. 9) Cert. denied October 12, 1953, 74 S.Ct. 39, 346 U.S. 831. Rehearing denied November 9, 1953. Order for cert. vacated June 7, 1954, 74 S.Ct. 861;

McFee v. United States, 206 F. (2d) 872 (Cir. 9). Cert. denied March 15, 1954, 74 S.Ct. 528, 347 U.S. 927. Order denying cert. vacated June 7, 1954, 74 S.Ct. 862;

Holland v. United States, 209 F. (2d) 516 (Cir. 10) Cert. granted June 7, 1954, 74 S.Ct. 863;

Smith v. United States, 210 F. (2d) 496 (Cir. 1) Cert. granted June 7, 1954, 74 S.Ct. 868;

Friedberg v. United States, 207 F. (2d) 777 (Cir. 6) Cert. denied, 74 S.Ct. 514; 347 U.S. 916. Cert. granted June 7, 1954, 74 S.Ct. 862.

The scheme employed by the prosecution is best described in the words of its chief witness Agent Klass:

“Well I attempted to reconstruct his income for each of those years telling his actual income by the net worth method or an outgrowth of the net worth method called the source and application of funds method.” (T.R. 464-465.)

Whatever sanction has been given the “net worth” method of proof by the Appellate Courts has not as

yet, in any reported case, been extended to this so-called "outgrowth".

This Court is too familiar with the principles of law governing the so-called "net worth" method of proof, to require an extended discussion. It may be said at the outset that this method of proof requires three elements to be proven beyond a reasonable doubt.

(a) A clear, concise and reasonably accurate determination of the net worth of the taxpayer at the start of the taxable period.

Calderon v. United States, 207 F. (2d) 377 (Cir. 9).

(b) A source of income during the period—that is for each of the years in question.

Schuerman v. United States, 174 F. (2d) 397 (Cir. 8).

(c) A net worth of the taxpayer at the end of the tax period that exceeded the sum of his net worth at the beginning of the period, his reported income and established personal expenditures during the period.

Bryan v. United States, 175 F. (2d) 223 (Cir. 5);

United States v. Fenwick, 177 F. (2d) 488 (Cir. 7).

In this prosecution not one of these principles was adhered to. Without establishing the fact or prima facie proof thereof, that the true income of the defendant could not be established from adequate

records for the two years in question, the government introduced into evidence, over his objection, extra judicial statements of the defendant concerning his financial position in the year 1941. These consisted of various offers in compromise made in that year and ultimately accepted in that year, the last being dated October 8, 1941. (Ex. 14F, T.R. 72.) Also included was a financial statement dated in November of 1941. (Ex. 58, T.R. 342-344.) The defendant testified that both these statements were untrue and were made with the advice of counsel for the purpose of avoiding the payment of disputed and contested claims for additional taxes. (T.R. 655-667.)

The government proceeded thereupon to introduce evidence over the objection of the defendant as to the expenditures of the defendant for the period 1942 to 1948. The extent of the government's proof is summarized by Exhibit 62 set forth in the Appendix hereto. It shows that for that period the defendant expended, according to their calculations \$832,993.06 in excess of the amount of funds available. Notwithstanding that the charge was wilful evasion of taxes for the years 1947-1948 all of the testimony as to prior years expenditures was received in evidence without any attempt on the part of the government to prove that the returns for the two years in question were false.

The government's own witness William Anater testified that he had records furnished to him by the defendant or others on his behalf from which he obtained the information and entries inserted in

the returns. (T.R. 298-299.) The accuracy of these records was not assailed by the government.

(1) Beginning net worth not established.

At the outset of this argument we stated that this case did not proceed upon a "net worth" theory but upon the so-called "out-growth" characterized as the "source and application of funds method". The government did not fix with certainty or at all the net worth of the defendant at the beginning of either of the tax years. Without such a foundation the proof of excess expenditures is not sufficient to prove income and evasion of tax thereon beyond a reasonable doubt. As was stated in the case of *United States v. Fenwick*, (Cir. 7) 177 F. (2d) 488 (1949):

"... when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established."

Here the basic net worth was the net worth for the first year mentioned in the indictment, 1947. That was the first charge of income tax evasion. The record is silent as to any proof as to the net worth of the defendant as of January 1, 1947. Likewise, as to his net worth for the other year in which he is charged with income tax evasion, 1948.

That this basic premise was not established is demonstrated by the government's Ex. 62 (Appendix) which shows according to the government's computations that the defendant's expenditures in the year

1946 exceeded funds available to spend by the sum of \$159,633.93. On the same exhibit is recorded three loans made by the defendant within the first 16 days of January, 1947, in the total amount of \$115,000.00, being the loans to Harold Ephlin (item 26) William Lias (item 42) and the North Bay Builders (item 43). That these transactions occurred within that period and were in cash was stipulated to by the government. (T.R. 876-877.)

The government offered no proof as to the source of these funds nor did it attempt by competent proof to exclude the hypothesis that such funds were available from accumulation in previous non indictment years.

In the *Fenwick* case (supra) the Court stated:

“Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. (Citing cases). By this rule we must test the sufficiency of the evidence offered by the government to establish defendant’s net worth at the beginning of 1943”.

By the same rule we must test the sufficiency of the evidence offered by the government to establish defendant’s net worth at the beginning of 1947. It is submitted that that evidence is totally lacking. Realizing that such was the case the prosecution attempted to rely upon the so-called “outgrowth” of the net worth theory and move the starting point back to a non-indictment year based on extrajudicial

admission of the defendant, without more. They then lumped together 7 years of receipts and expenditures, and the latter being greater than the former, secured his conviction of income tax evasion during the last two years.

The defendant was on trial only on the charges contained in the indictment, to-wit: that he wilfully attempted to defeat and evade income taxes for the years 1947 and 1948 by filing false and fraudulent income tax returns. Under that indictment he could not be tried for evasions in any years previous. By this method of proof he was required to defend against the unwritten accusation that he had defaulted in his tax obligations for each year commencing in 1942. This the law requires of no defendant notwithstanding the adroitness of prosecuting attorneys or revenue agents in contriving "outgrowths" of means of proof that violate every principle of criminal justice.

United States v. Fenwick, (7th Cir.) 177 F. (2d) 488 (1949):

"Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness

stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt."

(2) No source of income proved for the indictment years.

As indicated before only two witnesses testified with reference to a possible source of unreported income to the defendant. To so characterize the gist of their testimony is to view it in a light more favorable to the government than the testimony warrants. An examination of their testimony compels the conclusion that at most it permitted the jury to speculate and surmise that there might be a possible source of funds. This a jury is not permitted to do.

The government offered no direct testimony of unreported income items or of any undisclosed source of income. Faced with this lack of proof of an essential ingredient to a charge of wilful evasion they produced two debtors of the defendant. The first was Earl Beasley. The government at the outset of the trial stipulated that he was indebted to the defendant in the sum of \$104,000.00. (Stipulation 57; Appendix Ex. 62, item 41.) On cross-examination he

repudiated this stipulation and denied the debt. (T.R. 391.)

This witness on direct examination related a conversation with the defendant wherein he claimed that the defendant had informed him that he had lost \$125,000.00 betting on a horse owned by the witness. (T.R. 369-371.) He could not recall whether the conversation occurred in 1947 or 1948. He could not recall where or when the race was run. It was established without contradiction that the only time this particular horse raced with the particular jockey was on December 3, 1948. (Defs. Ex. L, T.R. 703.)

The second such witness was William Gaskill. He testified that he was present in the defendant's home and heard a conversation with reference to a \$15,000.00 wager. (T.R. 358-359.) He could not remember whether it was 1947 or 1948. He did not see any money change hands, nor did he know if the bet was made.

Even giving full credibility to this testimony it does not establish a source of unreported income nor does it tend to prove with any reasonable certainty the year in which the occurrence took place.

There was no proof direct or circumstantial that the defendant was engaged in any business, during the indictment years, legal or illegal, other than those disclosed on his income tax returns. There was no proof of concealment or destruction of records. There was no evidence, and there could be none of illicit or unlawful activities or a background thereof.

The Supreme Court in the case of *United States v. Johnson* (1943), 319 U.S. 503, stated that it was necessary to find that the defendant was engaged in an income producing business legal or illegal. In that case involving a gambling house operator and owner the Supreme Court reviewed the evidence submitted by the government showing that there had been gambling transactions on an enormous scale that were overwhelmingly established by the government's proof and pointed out that the long duration of the gambling business, the substantial evidence of the law of probability in favor of the gambling houses, records pertaining thereto, all supported the government's contention that the defendant during the indictment years enjoyed a source of income therefrom. After reviewing all of these factors the Court stated that this evidence:

“made it not a *matter of tenuous speculation but of solid proof* that there were winnings of a substantial amount which Johnson did not report.”
(Italics supplied.)

Comparing the proof in that case with the instant record shows that based on the testimony of these two witnesses the jury was permitted to engage in the tenuous speculation that this defendant for the years included in this indictment had unreported income from any source.

Here in this case all the government attempted to do was prove a series of expenditures both in the indictment years and in years previous thereto. It made no attempt to fix the net worth of the defendant

at the beginning of the tax years in question, and thus establish that such expenditures as were made in those years did not come from previous accumulations, and it made no attempt to prove the possible source of those expenditures during the two years in question. Having thus concluded its case, it placed the burden upon the defendant of proving his innocence. As this Court knows, it is sometimes impossible for a defendant to prove his innocence and the law wisely does not require that of him. By proceeding on a sheer expenditure method of proof over the period in question here, the defendant was called upon not only to answer the charges contained in the indictment but to explain variances between income and outgo over a period not included in such indictment.

This method of proceeding was commented upon by Meyer Rothwacks in a paper entitled "Indirect Proof of Income in Tax Evasion Prosecutions" submitted at the Symposium of the American Bar Association, Section of Taxation, on Tax Fraud Proceedings and Law, September 1950, Washington, D.C. There the author stated:

"Permitting a case to go to the jury predicated upon expenditures plus a possible source of income, means that the jury may bring in a verdict of guilty although the government has not proved a case beyond a reasonable doubt. Indeed, a verdict of guilty rests upon the probability that a defendant who fails to explain satisfactorily the source of his expenditure had received unreported income during the tax year. Thus, the

prosecution is permitted to prevail, not by adducing evidence inconsistent with innocence, but by shifting the burden of adducing evidence to the defendant. No longer may a defendant sit back and wait for the government to prove his guilt. And even if a defendant attempts to explain the source of his funds, the jury need not accept that explanation."

See Balter, "Fraud Under Federal Tax Law", page 291, Footnote 28.

(3) Failure to prove a net worth at the end of either of the tax periods.

As stated above this case proceeded on the theory that every dollar spent by the taxpayer in excess of his reported income in any given year, was taxable unreported income for that particular year. This theory is not supported by the evidence or the authorities. It is a false theory unless it is shown with what assets or resources the taxpayer was possessed at the beginning of the indictment year, what his sources of income were during the year, and finally his net worth at the end of the year. These are the circumstantial measuring sticks and without any or all of them there is no true measure.

The government offered no proof of the defendant's net worth at the close of 1946, whereby his income for 1947 could be measured. Because no closing net worth for the year 1947 was proven no measure of income was available for 1948. Without these the whole case of the government depended upon a showing of expenditures by the defendant in excess of

reported income, without excluding the reasonable hypothesis that such excess expenditures were possible through previous accumulations in non-indictment years.

The case of *Bryan v. United States*, 175 F. (2d) 223 (Cir. 5) is one which is familiar to this Court. There the government sought to prove a case of wilful evasion of income taxes for a four year period. There was no direct testimony of failing to account for gross income, false deductions or false books and records. The government showed by the testimony of approximately fifty witnesses and by documentary proof that the defendant had made expenditures in each of the indictment years of sums greatly in excess of the gross income reported for each year.

The government insisted that the defendant's net worth during each year in question was increased by expenditures made in excess of reported gross income. The defense, as here, was that the evidence failed to show that the expenditures in excess of reported gross income came out of current receipts and not out of available assets acquired by him in prior non-indictment years.

The defense there, as here, was that the defendant had amassed considerable wealth in years prior to the indictment years and secreted the same in the form of currency in defendant's home.

In reversing the conviction the Court stated:

"The net worth expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net

worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate.”

The Court pointed out in that case that the evidence failed to show a lack of additional assets at the beginning of the tax period, and for that reason should not have been submitted to the jury. Here the evidence failed to show a lack of additional assets at either the beginning of the tax period January 1, 1947, or the end of the tax period December 31, 1947, covered by the first two counts of the indictment or at the beginning and close of 1948.

We submit that here as in the *Bryan* case the evidence was circumstantial and failed to exclude every reasonable hypothesis other than the guilt of the defendant.

CONCLUSION.

In no reported case has the government attempted to convict a defendant of a wilful attempt to defeat or evade income taxes on the theory advanced here. Without establishing the inadequacy of records maintained on behalf of the defendant reflecting his income for the two years contained in the indictment and without establishing by any recognized form of competent evidence a source of income in addition to that reported for these years, the government was permitted to proceed on what it terms an “out

growth" of the net worth method of proof to secure the conviction of the defendant of spending too much money.

Had this been a proper case for the application of any judicially recognized method of proof still the government would have failed. It failed to establish the keystone of such a case, the starting point net worth of the defendant at the beginning of 1947, the first year of the indictment.

The defendant by his plea of not guilty put in issue the charges contained in this indictment. He was not called upon to plead to any charge not contained therein. The government did not proceed to prove the charges contained in the indictment but placed in evidence a series of expenditures for seven years that exceeded his reported income. It failed to exclude the reasonable hypothesis that for the years 1947 and 1948 the excess of expenditures did not come from previous accumulations in prior non-indictment years.

The government notwithstanding its failure to prove the charges contained in the indictment by adducing evidence pertaining to the years involved inconsistent with the defendant's innocence, shifted the burden of proof to the defendant. It not only shifted to the defendant the burden of proving his innocence to the charges contained in the indictment but to the unwritten charges which were the true "outgrowth" of the method employed by the government and permitted by the trial Court.

For the reasons herein set forth it is submitted that the evidence is insufficient to support these convictions and the same should be reversed.

Dated, San Francisco, California,
November 5, 1954.

Respectfully submitted,
JAMES E. BURNS,
Attorney for Appellant.

(Appendix Follows.)

No. 14,450

United States Court of Appeals
For the Ninth Circuit

GEORGE W. LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

LLOYD H. BURKE,

United States Attorney,

JOHN LOCKLEY,

Assistant United States Attorney,

422 Post Office Building,

San Francisco 1, California,

Attorneys for Appellee.

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No. 14,450

United States Court of Appeals

For the Ninth Circuit

GEORGE W. LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

Appellant was indicted on January 13, 1954 in the District Court for the Northern District of California, Southern Division, for wilfully and knowingly attempting to defeat and evade a large part of the income tax due and owing by him and his wife for the calendar years 1947 and 1948 in violation of Section 145(b), Internal Revenue Code (R. 3-6).

On May 13, 1954, the jury returned a verdict finding appellant guilty on each count of the indictment (R. 16).

On June 8, 1954, the District Court committed appellant to the custody of the Attorney General for a

period of one year on each of the three counts, the sentences of imprisonment to run concurrently, and imposed a fine of \$8,000 on each of the three counts, or a total fine of \$24,000 (R. 18-19). Jurisdiction of the District Court was conferred by 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure. Notice of appeal was filed on June 8, 1954 (R. 20).

This Court has jurisdiction under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

Whether the evidence of source of income, lack of records and beginning net worth was sufficient to support the verdict.

STATUTE INVOLVED.

Internal Revenue Code:

Sec. 145. Penalties.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and,

upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

[26 U.S.C. 145.]

STATEMENT OF FACTS.

Appellant was indicted in the United States District Court for the Northern District of California, Southern Division, in three counts charging wilful attempted tax evasion. The first count charged that he evaded his own taxes for the year 1947; the second count charged that he evaded his wife's taxes for 1947; and the third count charged that he evaded their joint taxes for 1948.¹

To prove its case, the Government undertook to prove (1) *income* by showing that appellant had spent, invested or loaned \$1,604,608.71 from 1942 to 1948 (Ex. 62); that he had available from earnings, gifts, repayment of loans and all other disclosed sources, a total of \$771,615.65 in the same years (Exs. 61, 62); that allowing all adjustments for capital gains, etc., he had net taxable income greatly in excess of the amount disclosed on his tax returns and those

¹Set out in tabular form the indictment figures are:

	INCOME REPORTED	CORRECT INCOME	TAX REPORTED	CORRECT TAX
Count 1	\$ 9,483.25	\$197,300.47	\$ 2,018.10	\$145,761.90
Count 2	11,543.09	197,300.47	2,884.55	146,189.40
Count 3	115,153.06	308,099.51	53,113.62	199,834.82

of his wife for each year, 1942 to 1948 (R. 468-500; Ex. 63),² (2) *source of income* by showing that appellant had many sources of income from legitimate businesses and was also engaged in gambling activities, (3) *lack of records* by showing that he kept no records of his gambling operations, loans, investments (other than those kept in the conduct of each business by others) or other sources of income and (4) that his expenditures (falsely represented by appellant as reflecting only a prior accumulation of \$1,000,000 in currency kept in suitcases) could reasonably be attributed only to unreported taxable income.

In his brief, appellant apparently concedes the accuracy of the Government's computation of the nature and amount of his expenditures and of his available funds, and contents himself with an attack on the sufficiency of the evidence to show (Ap. Br. 6):

- (1) the inadequacy of the records;
- (2) the net worth starting point; and
- (3) the source of income.

The details of this proof, inadequately summarized in appellant's brief, show clearly that all possible requirements were fulfilled.

²The amount of unreported or additional income established for each year is as follows (Ex. 63):

1942	\$ 9,411.94	1946	\$158,582.54
1943	1,668.59	1947	469,779.35
1944	21,632.69	1948	193,063.69
1945	39,973.52		

I. THE INADEQUACY OF THE RECORDS.

At the outset of the investigation of his tax liabilities, appellant was questioned by witness Klass, a Special Agent of the Internal Revenue Service, in the presence of appellant's attorney (R. 458). He was asked for his records and he told Klass he kept no records (R. 460, 519). The only records Klass subsequently saw were some notes for loans appellant had made to others (R. 460). Appellant refused to turn over his cancelled checks to Klass (R. 854). He also failed to supply Klass with certain information, requested by letter (Ex. 66), relating to his gambling activities (R. 857-858) and to check withdrawals (R. 929-936; Ex. 71) although the latter information was known to him (Def. Ex. M).

William Anater, a tax accountant who prepared appellant's income tax returns for 1945 to 1948 (Exs. 1, 4, 6, 18) and those of his wife for 1946 and 1947 (Exs. 2, 3, 5), testified that appellant had no record of the gambling gains reported on his 1945 returns (R. 219-222; Ex. 18) and that this information was given to him orally by appellant at the time the return was prepared (R. 220). He saw no books or records or appellant's bank statements for the year 1946, and the tax return for this year was prepared entirely from oral information given to him by appellant together with a withholding statement from the Detroit Racing Association and a partnership profit and loss statement (R. 225). He was not informed of

appellant's partnership interest in Universal Cleaners in 1946 (R. 225-226).³

Anater testified that appellant had no personal records in connection with the entries shown on the 1947 return (R. 228) and no records of the cost of his interest in Universal Cleaners (R. 229).

In preparation of the 1948 return, Anater saw no records of investment in Detroit Racing Association (R. 232); he did not recall any records from which the cost figures of the Alhambra Bowl were derived, but that there must have been some (R. 233), and other entries on the return were derived from statements supplied by the various business enterprises in which appellant had an interest (R. 229-236).

Appellant himself testified on direct examination to a conversation prior to indictment with an attorney of the Internal Revenue Service in December, 1953: "Well, he asked me if I could establish such a thing [the claim of \$1,000,000 currency] and if I had any records or anything of that nature. And I told him that I had no records * * * (R. 727)." On cross-examination he repeatedly admitted he had no records, receipts, no retained copies of tax returns for years beginning in 1920 or records of a similar nature (R. 734-769). No books of account or similar records were produced by him at the trial.

A portion of the transcript of a proceeding in the Superior Court for the State of California, in and for

³Appellant had a one-sixth interest in Universal Cleaners, but his name did not appear on the books of the partnership because of the objections of one of the partners (R. 138-139, 146-148).

the City and County of San Francisco, In the Matter of the Estate of Frank A. Girard, deceased, wherein appellant testified on a claim against the estate, was read into the record below (R. 451-455). In that proceeding appellant was asked (R. 452):

“Q. Then there is no record of any character, receipts, cancelled checks, entries in books of account as to that \$9,141.80 other than the statement here?

A. I guess that is all.

Q. Do you know whether it is or not?

A. I never keep no records.”

Appellant was again asked (R. 453):

“Q. Are there any book entries?

A. I keep no books.

Q. But you keep no books of any kind?

A. No.”

Appellant testified that there was an amount of \$4,500 owing by him to Girard. “I had made a bet on a horse and lost it and I hadn’t paid it (R. 453).”⁴ When asked if there were any books and records on that he replied “Not that I know of (R. 453).” He testified that all of his transactions with Girard were in cash and no receipts were taken (R. 452-454).

Appellant invested currency in various business enterprises, often such investments appearing on the books of the companies in the names of others. He furnished funds for investment in Universal Cleaners

⁴On cross-examination in the case at bar, appellant said that he testified falsely in the probate proceedings as to what the \$4,500 was for (R. 852).

(R. 133-143) but did not appear as one of the partners on the books (R. 138-139). He invested \$90,000 in 1946 in Laird Medical Building, Inc., the total capital of the corporation, but only 216 shares of stock were issued in appellant's name, the remaining shares being in the names of Messrs. Braden, Girard, Laird, who had 216 shares a piece, and 36 shares to Anater (R. 172-173, 252, 418-419). He had custody of the stock certificates in the names of Anater and Laird, and they were ultimately transferred to his name without consideration (R. 252-253, 419-420). A loan of \$5,000 by appellant to the corporation was made in 1946 in Laird's name, and a \$20,000 loan was made in 1947 in the name of Girard (R. 256-261, 421; Exs. 24a, b; 62). An investment in 1946 in Holland's Frozen Foods was in Anater's name (R. 245).

II. THE NET WORTH STARTING POINT.

In the absence of records, the necessary theory of the prosecution was that the appellant had made large cash expenditures during the years 1947 and 1948 which exceeded funds available to him as reported on his income tax returns and from non-taxable sources, and that such expenditures were derived from current income. In order to preclude the hypothesis that such expenditures were made from prior accumulated funds, evidence of his financial status at a fixed time was produced. The time chosen was December 31, 1941.

One facet of this evidence consisted in part of tax transfer vouchers (Exs. 10-12j, inclusive), setting up a tax liability of \$4,096.09 against appellant as transferee of the Arcadia Corporation, a Washington dog race track, for the year 1933. The liability was originally transferred to the Office of the Collector of Internal Revenue for the First Collection District of California on July 13, 1936 (R. 35) and thereafter the account was transferred to various collection districts in Ohio, Michigan, and Florida (R. 30-43; Exs. 11, 12). On January 16, 1940 the liability had increased to \$4,414.77 by reason of accrued interest, and it was transferred on that date to Jacksonville, Florida (R. 43) together with a \$500 government check which was a refund check to appellant of an amount he had submitted with an offer in compromise of the account in Michigan (R. 49-51). No assets of appellant were found in the various collection districts from which the liability could be collected (R. 47; Exs. 11a, b, c).

On March 25, 1940 appellant offered \$500 to the Collector of Internal Revenue at Jacksonville, Florida, in full settlement of the liability of \$4,414.77, stating in the offer signed by him under oath that the corporation owned no assets and "my net worth nil (R. 58-59; Ex. 13)." On January 15, 1941 appellant filed a new offer increasing the amount in settlement to \$1,000 (R. 61, Ex. 14a). A further amended offer was submitted on April 15, 1941, signed by appellant under oath, in which the offer was increased to \$1,500, to be paid \$750 down and the balance of \$750 in monthly

installments of \$150 beginning June 15, 1941 (R. 63-66, Ex. 14c). The reasons set forth in the offer as grounds for acceptance were: "Corporation has no assets and my inability to pay more than the amount tendered (R. 65, Ex. 14c)."

On October 8, 1941 appellant filed an amended offer in compromise, signed and sworn to under oath, offering \$1,500 in settlement of the tax liability of Arcadia Corporation, the amount to be paid from \$750 on deposit and the balance of \$750 within 10 days after acceptance (R. 70-72; Ex. 14f). In the offer he stated he was unable to pay more than the amount offered (Ex. 14f). This final offer was accepted on December 31, 1941 (Exs. 14g, 14h) and was paid on February 11, 1942 (R. 77).

As further evidence of appellant's financial condition, there was introduced into evidence a financial statement signed by him and sworn to as being true and complete in every respect as of November 3, 1941, the date of its preparation and signing (R. 342-349, 820-829; Ex. 58). In this statement appellant listed his assets as follows:

Cash	\$5,100
Notes Receivable	None
Accounts Receivable	None
Automobile	1,300
Stocks and Bonds	None
Real Estate	None

Liabilities were listed as "Owe \$750 on offer in compromise for taxes assessed against me as transferee of Arcadia Corporation." The statement called for gross

income for the past three calendar years, which was given as: "1939, \$4,600; 1940, \$5,100; 1941, \$9,700 (R. 347, Ex. 58)."

Appellant made a statement on October 11 and 12, 1951 to Agents Klass and Alliguie of the Internal Revenue Service, while represented by counsel, and subsequently signed the statement under oath (R. 458-459). At that time he stated he had received Christmas gifts of \$2,500 each from Mr. Lehr and Mr. Strong in each year from 1936 to 1946, and had received no other gifts (R. 461); that he did not know what assets he had at the end of 1941 or of any year from 1941 to 1948 (R. 461-462, 809); that he had received no inheritances (R. 459); no benefits from trust funds (R. 460); and that he did not know who owed him money nor how much (R. 460).

During the years 1942 to 1948 appellant dealt largely in currency, with the amount of his expenditures increasing regularly each year and amounting to \$525,230.25 for the year 1947 and \$577,466.87 for 1948 as detailed in Exhibit 62. It would require a complete summary of all the testimony to set forth the extent of appellant's cash (currency) dealings, but it is a fair statement that the bulk of his loans and investments were made with currency and no records were kept by him of these amounts (R. 468-492).

Further evidence of appellant's lack of cash on hand was demonstrated by a loan he made from the Bank of Ohio for \$30,900 on May 15, 1944, which was paid down by installments to \$19,900 on May 15, 1945

and renewed on maturity in the amount of the balance and paid off by installments ending May 13, 1946 (R. 127-130; Exs. 25, 26, 27). In 1944 he turned in a life insurance policy for its cash surrender value of \$2,247.45 (R. 833; Exs. 53, 61).

In June, 1947, appellant was interviewed by John J. Madden, a Treasury agent, about his 1945 tax return (R. 898). During the course of that interview he was asked how much money he had, and he told Madden that at the time of the meeting (June, 1947) he had several thousand dollars on his person and at least \$50,000 in his safe at his home (R. 900, 908).

Although appellant testified he had paid substantial amounts of income tax in the years 1920 to 1930, he had no record of his returns or payments (R. 620-630, 731-754). Records of the Internal Revenue Service for all persons with the same name as appellant who filed returns at San Francisco, California, showed only nominal tax payments, when any, of not more than \$75 in any one of those years (R. 918-923; Exs. 68, 69a-1), and no record for 1930 or 1931 (R. 923). From 1932 to 1935 Internal Revenue Service records disclosed total tax paid by appellant and his wife jointly of \$862.16 (R. 923-926; Ex. 70).

Records of other tax collection districts wherein appellant had resided during 1920 to 1941 were offered in evidence by the Government and excluded on objection of appellant (R. 936-941).

The starting point for determination of appellant's net worth, and of moneys received and expended by

him, was December 31, 1941 (R. 465; Exs. 61, 62). He was credited on that date with \$5,000 he said he had received as gifts for Christmas, 1941, and the \$5,100 cash shown by his written and sworn statement of assets and liabilities filed with the Internal Revenue Service on November 3, 1941 (R. 343-349, 469; Ex. 58). In 1942 he spent \$9,425.53 more than his reported earnings, gifts and other non-taxable funds available (R. 471; Exs. 61, 62). In 1943 he spent \$8,397.40 less than funds available from all known sources, and this amount was credited as cash on hand at the beginning of 1944 (R. 471-472; Exs. 61, 62, 63). In 1944 he spent \$20,877.51 more than reported income and non-taxable funds available (including cash on hand carried over from the prior year) (R. 473-474; Exs. 61, 62, 63). In 1945 he spent \$24,099.11 more than his reported income and non-taxable receipts (R. 476, 477; Exs. 61, 62). In 1946 he spent \$159,633.93 more (R. 480; Exs. 61, 62, 63). In 1947 he spent \$468,095.66 more (R. 486), and in 1948 he spent \$159,258.72 more than available according to his tax returns and non-taxable receipts (R. 491; Exs. 61, 62).

III. THE SOURCE OF THE INCOME.

Appellant has been associated with horse racing tracks all of his adult life, both as an employee and as a "bookmaker" handling bets and "come-back" money (R. 614-615, 730-863). He worked in many places but from 1924 to and including 1948 he used a

cigar store and club located at 84 Ellis Street, San Francisco, California, as his office and mailing address, and placed that address on some of his tax returns (R. 76, 266-267, 372-373, 454-455, 711, 753, 803, 896). This establishment was described by Earl Beasley as a place where he had seen bets taken on horses (R. 374-375). During the fall of 1947 or the spring of 1948 appellant admitted to William Gaskill that he owned the cigar store on Ellis Street (R. 361). Appellant shared the safe in the club with Mr. Girard for 15 years (R. 709, 804). He also admitted personal wagering on horse races both on and off the tracks (R. 453, 799-803, 848). In his testimony on a claim against the estate of Frank A. Girard, appellant testified that he owed Girard \$4,500 because "I had made a bet on a horse and lost it and hadn't paid it. (R. 453)."

Gaskill testified to a conversation in his presence between appellant and Girard in the fall of 1947 or spring of 1948 when appellant told Girard to make a \$15,000 bet on a horse the next day (R. 358-360).

Beasley testified that he had a horse named "The Man" running at Tanforan in 1947 or 1948, he was not sure of the date; that he told appellant he thought the horse would win; that afterwards appellant told him he had lost \$125,000 on the horse; and that Beasley accompanied him from 84 Ellis Street to a bank where appellant took money out of a safety deposit box to pay the bet (R. 372-374). Before going into the bank appellant took a book out of his pocket and said "Don't call me by my name when you go in there; I got several boxes; don't call me by my name

(R. 373).” Appellant had a safety deposit box from 1944 to 1948 in the name of his nephew, who was seven years old in 1945 (R. 780-781), and had another safety deposit box in the name of George Williams which he opened in 1944 (R. 782) or 1945 (R. 807). Appellant admitted making a “small bet” of \$1,000 on “The Man” when he ran at Tanforan on December 3, 1948 (R. 703-704; Def. Ex. L).

A deposition of John J. Gedert, taken on motion of the appellant, is among the exhibits transmitted to this Court. Gedert therein states that appellant received a salary of \$100,000 in 1948 and a bonus of around \$100,000 in connection with his employment by the Detroit Racing Association (Deposition, page 39). No part of the bonus was reported in the 1948 tax return of appellant and his wife (Ex. 6).

Appellant had a partnership interest in Laurel Pottery Manufacturing Company, the partnership return of which company showed his distributive share of partnership income for the fiscal year ending March 31, 1948 to be \$43,198.44 (R. 238-239; Ex. 9). None of this amount was reported in his 1948 return (R. 239; Ex. 6).

IV. THE DEFENSE.

Appellant has not attacked the accuracy of the Government's computations in his brief, and during cross-examination he conceded that the figures of expenditures and receipts in Exhibits 61 and 62 were substantially correct (R. 858-861). The defense was

that appellant had earned \$1,000,000 from bookmaking activities by 1928 or 1930 (R. 631, 771); that he accumulated nothing further and still had the million dollars in 1941 (R. 654, 772). On cross-examination he first testified he still had the million dollars at the end of 1948 (R. 772). When it became apparent to him that he had trapped himself by this answer, he claimed to have misunderstood the questions to mean all his assets rather than currency alone (R. 773).

Appellant was then taken back over the same ground and testified that all of his assets at the end of 1941 were in cash of approximately \$1,000,000; that he invested \$100,000 in 1942; and still had \$900,000 cash on hand at the end of 1946, \$75,000~~in~~ cash at the end of 1947⁵ and that he could not tell how much he had at the end of 1948 (R. 774-777).

Appellant's wife testified that she had first seen currency in a suitcase belonging to appellant in 1928, about three years after their marriage (R. 562-565, 570-575); that she had never counted the money and did not know how much was in the various suitcases used for storage of money at any time (R. 565, 574); that the suitcases were carried around in the car from place to place until 1947 when a permanent home was purchased (R. 567, 573-576); and that she imagined he still had money in a suitcase in 1949 (R.

⁵Appellant spent \$525,230.25 in 1947, while having only \$57,134.59 available from reported taxable income and non-taxable receipts. Even assuming he spent \$150,000 from his claimed cash hoard, this does not account for the additional expenditures of \$318,095.66 which he admittedly made in 1947 (Exs. 61, 62, 63).

576). Other defense witnesses testified generally to indefinite amounts of money allegedly in appellant's possession at various times but either had not seen the money or had not counted it or did not know if it belonged to appellant (R. 436-441, 589-602, 609).

SUMMARY OF ARGUMENT.

Reduced to its simplest terms, appellant's main argument is that the jury's verdict was not warranted by the evidence admitted against him. The Government failed, he argues, to establish by competent evidence that his records were inadequate to warrant use of an indirect method of proof of income; to show the source of his income; or to show his beginning and ending net worth. The argument is refuted by the record.

Without citing authority or dwelling upon the issue in his argument, appellant merely asserts that proof of inadequacy of records is a condition precedent to use of the method of indirect proof of income here employed. Assuming, *arguendo*, that proof of lack of records is essential, this requirement has been amply fulfilled.

The evidence clearly shows that appellant kept no records, and he produced none during the investigation (except fragmentary notes for money loaned) or during the trial. He refused to make cancelled checks available to the Treasury agents. Except for records of businesses in which appellant had an interest, which were kept by others, his accountant saw no records when the tax returns were prepared. Ap-

pellant repeatedly admitted during the trial and prior thereto that he kept no records.

The law is also clear that proof of the exact amount or precise source of income is not required. There was evidence that appellant was engaged in personal gambling on horse races and also owned an establishment where such bets were taken. One of his own witnesses testified by deposition to a \$100,000 bonus paid appellant in 1948 which was not reported. The evidence also showed that he had income from partnerships which was not reported. The jury was entitled to infer that his income came from one or all of the various sources, both legitimate and illegitimate, proved during the trial.

By his own prior sworn admission, appellant's net worth was \$6,400 in November, 1941, including \$5,100 in cash. In October, 1941, he offered to settle a long outstanding tax liability of \$4,414.77 for \$1,500 with the sworn statement that he was unable to pay more. The record of his tax returns for years going back to 1920 showed no large earnings from which an accumulation of funds could have been made. He borrowed \$30,900 in 1944 and paid it in installments over a two year period. In 1944 he also cashed in a life insurance policy. In 1947 he claimed to have only \$50,000 in cash at home and a few thousand dollars on his person. He was given credit for all gifts he claimed to have received, and admitted he had no inheritances or trust funds.

Thus, there was a firm starting point for the computations showing huge expenditures in excess of

available declared resources for each year from 1942 to 1948. The gradual increase of the expenditures fortified the conclusion that they came from large unreported earnings. This evidence convincingly established the appellant's cash on hand and defeated his single contention—that the expenditures reflected only a hoard of idle cash accumulated over a decade before. The jury's verdict was plainly proper.

ARGUMENT.

A jury under instructions which were without dispute correct in defining the quantum of proof necessary for conviction, found appellant guilty. In this Court, appellant undertakes the difficult burden of urging as his primary ground for reversal that the evidence was in various respects insufficient to support the verdict. Although he relies upon seven specifications of error, he concedes that they all amount to an attack on the sufficiency of the evidence (Ap. Br. p. 11).⁶

⁶It is a well established principle that this Court, in determining whether the evidence is sufficient to sustain the verdict, will view the record in the light most favorable to the Government and affirm if the evidence, so viewed, was sufficient to justify the jury in finding, beyond a reasonable doubt, that there has been a willful attempt to evade taxes.

Papadakis v. United States (C.A. 9, 1953), 208 F.2d 945;
Gendelman v. United States (C.A. 9, 1951), 191 F.2d 993,
 995, cert. den. 342 U.S. 909;

McFee v. United States (C.A. 9, 1953), 206 F.2d 872, 874,
 cert. den. 347 U.S. 927, order denying cert. vacated 347
 U.S. 1007;

Norwitt v. United States (C.A. 9, 1952), 195 F.2d 127,
 cert. den. 344 U.S. 817.

I. THE NET WORTH STARTING POINT WAS FIRMLY ESTABLISHED.

The Government's proof that appellant had wilfully attempted to evade substantial income taxes showed that (except for 1943) in each of the years from 1942 to 1948, inclusive, appellant spent far in excess of the sum of the income reported on his tax returns and funds available from all other sources. Although described by the witness Klass as "the net worth method or an outgrowth of the net worth method called the source and application of funds method (R. 465)", the system employed is more commonly known as the net worth-expenditures method (R. 542). Such methods have been universally recognized by Federal Appellate Courts as valid means of proving wilful attempts to evade income taxes.

United States v. Johnson (1943), 319 U.S. 503, 517;

Smith v. United States (C.A. 1, 1954), 210 F.2d 496, certiorari granted, 347 U.S. 1010;

United States v. Norris (C.A. 2, 1953), 205 F.2d 828;

United States v. Vassallo (C.A. 3, 1950), 181 F.2d 1006;

Bell v. United States (C.A. 4, 1950), 185 F.2d 302, certiorari denied, 340 U.S. 930;

Sasser v. United States (C.A. 5, 1953), 208 F.2d 535;

Gariepy v. United States (C.A. 6, 1951), 189 F.2d 459;

United States v. Chapman (C.A. 7, 1948), 168 F.2d 997, certiorari denied, 335 U.S. 853;

Mitchell v. United States (C.A. 8, 1954), 208 F.2d 854, certiorari denied, 347 U.S. 1012;
Barcott v. United States (C.A. 9, 1948), 169 F.2d 929, certiorari denied, 336 U.S. 912;
Holland v. United States (C.A. 10, 1954), 209 F.2d 516, certiorari granted, 347 U.S. 1008.

Additionally, this Court has recently approved net worth and expenditures methods of proof in *McFee v. United States* (1953), 206 F.2d 872, certiorari denied 347 U.S. 927, order denying certiorari vacated 347 U.S. 1007; *Remmer v. United States* (1953), 205 F.2d 277, judgment vacated on other grounds 347 U.S. 227; *Davena v. United States* (1952), 198 F.2d 230, certiorari denied 344 U.S. 878; *Calderon v. United States* (1953), 207 F.2d 377, certiorari granted 347 U.S. 1008; *Goldbaum v. United States* (1953), 204 F.2d 74, certiorari denied 346 U.S. 831, order denying certiorari vacated 347 U.S. 1007; *Bateman v. United States* (1954), 212 F.2d 61; *Gendelman v. United States* (1951), 191 F.2d 993, certiorari denied 342 U.S. 909; *Chan Shing Ho v. United States* (1951), 186 F.2d 574; *Papadakis v. United States* (1953), 208 F.2d 945.⁷

⁷On June 7, 1954 the Supreme Court granted certiorari in *United States v. Calderon*, supra, and vacated its earlier orders denying certiorari in *McFee v. United States*, supra, and *Goldbaum v. United States*, supra, and restored them to the docket. It also granted certiorari in *Friedberg v. United States*, 347 U.S. 1006, reported below 207 F.2d 277 (C.A. 6); *Holland v. United States*, supra, and *Smith v. United States*, supra. The order denying certiorari in *Banks v. United States* (C.A. 8), 204 F.2d 666, certiorari denied 346 U.S. 857, was likewise vacated and the case restored to the docket 347 U.S. 1007. Each of the cases in which certiorari was granted involves a conviction for evasion of income taxes obtained by use of the net worth-expenditures method.

In *McFee v. United States*, supra, this Court recognized that the expenditures and net worth methods are "merely accounting variations of the same basic method, the expenditures theory being an outgrowth of the net worth method." The underlying theory of each method is that if expenditures or accumulations of assets, or both combined, exceed reported income for the period, and the expenditures or net worth increases are not attributable to non-taxable sources such as gifts, devises, loans or a prior accumulation of funds, the conclusion may be drawn that either the excess of expenditures over receipts or the net worth increases, or a combination of the two, is a measure of income.

It is fundamental that in order to make a *prima facie* case the Government must establish the taxpayer's net worth at the beginning of the period in question with a reasonable degree of certainty; otherwise the increase might be more apparent than real. *Sasser v. United States*, supra, page 537; *Bell v. United States*, supra, page 308; *Brodella v. United States* (C.A. 6, 1950), 184 F.2d 823, 824; *Calderon v. United States*, supra. Proof of a taxpayer's visible assets and his liabilities at the beginning of the prosecution years may not establish firmly the starting point net worth, because the taxpayer may have had other assets, particularly currency, hidden from view. *Bryan v. United States* (C.A. 5, 1949), 175 F.2d 223,

Although the opinions are not available at this writing, it is understood that the Supreme Court on December 6, 1954 upheld the Government's contentions in each of the cases in which certiorari was granted.

affirmed, 338 U.S. 552; *United States v. Fenwick* (C.A. 7, 1949), 177 F.2d 488. There must be solid evidence to bolster the conclusion that the taxpayer has been given credit for all the assets he owned at the beginning point. Such evidence usually consists of an admission from the taxpayer, prior actions inconsistent with wealth, or the results of an investigation into his financial history prior to the prosecution years. If such evidence is not available and presented, the Government fails to sustain its burden of proof because it has not foreclosed the possibility that what appear on the surface to be net worth increases are in fact merely the result of a change in the form of previously acquired assets. *Bryan v. United States*, *supra*.

But where the Government does present such evidence, its burden is simply to make a *prima facie* case. Its evidence must be sufficiently substantial to warrant a jury in concluding that the defendant did not in fact have concealed assets not revealed in the starting point computation. The Government is not required to refute all conceivable speculation as to the source of a taxpayer's funds or to prove the precise amount of his undeposited cash on hand at the starting point. *Garipey v. United States*, *supra*, page 463; *Schuermann v. United States* (C.A. 8, 1949), 174 F.2d 397, 399, certiorari denied, 338 U.S. 831; *Bell v. United States*, *supra*, page 308.

The extent of appellant's net worth was shown by his own statement made *ante litem motam* on November 3, 1941, at which time he had \$5,100 in currency

and an automobile valued at \$1,300 (R. 349; Ex. 58). The net worth starting point at December 31, 1941 included this cash on hand and allowed an additional \$5,000 which appellant claimed to have received as Christmas gifts in 1941 (Ex. 62).

Further evidence of a lack of ready cash prior to 1941 consisted of a series of offers in compromise of a tax liability of slightly over \$4,000 outstanding from 1933 to 1941 when a \$1,500 offer was accepted in full settlement (R. 55-93). In the various attempts to compromise this liability, appellant repeatedly referred to his inability to pay more and asserted that his net worth was nil (Exs. 13, 14 a-j). The record of his income tax returns for two decades before revealed only nominal amounts of tax and an income grossly inadequate to corroborate the alleged earnings from which the claimed \$1,000,000 in currency was put aside (R. 918-923).

Thus, there was a firm starting point on December 31, 1941 which amply foreclosed the hypothesis of prior accumulated funds. Appellant appears to contend, however, that the starting point selected should have been December 31, 1946 (App. Br. 15-18). Any prior net worth starting point is satisfactory, for it serves only as a firm foundation so that the increment in net worth and non-deductible expenditures can be compared with the income actually reported. To establish a solid basis for the computations of his later expenditures, no matter what date is selected, and building upon that foundation year by year to the first year in the indictment, is to fix the taxpayer's

net worth at each point of the case. The determination of appellant's net worth at the end of each year from 1942 to 1948 is a mere mathematical calculation.

As shown by Exhibit 62, it was a physical impossibility for him to have accumulated funds from 1942 to the end of 1946, for he was spending in those years a total of \$205,638.68 more than he reported as income and had available from non-income sources. The jury was entitled to infer from this circumstance, and his lack of funds prior to 1941, that the further expenditures in 1947 and 1948 were from current earnings. Moreover, appellant does not contend that he earned the excess funds from 1942 to 1946, but has consistently alleged that his returns for those years were correct (R. 463-464, 730).

The practice of reaching into the taxpayer's past to establish his financial condition for years prior to the first indictment year has been repeatedly approved by the Appellate Courts. In *McFee v. United States*, supra, the inquiry began with the year 1935, although the first indictment year was 1945. In *Gariepy v. United States*, supra, the inquiry began with 1938, and the first indictment year was 1944. The prosecution years in *United States v. Skidmore* (C.A. 7, 1941), 123 F.2d 604, were 1931 to 1938. Proof of cash status reached back to 1919. In *United States v. Johnson*, 319 U.S. 503, the indictment years were 1937 to 1939. Johnson's cash resources were shown at the beginning of 1932, to which were added his receipts and from which were subtracted his ex-

penditures to arrive at his cash balance at the beginning of 1937. This is the identical formula employed by the prosecution in this case. See also *United States v. Potson* (C.A. 7, 1948), 171 F.2d 495; *Barcott v. United States*, supra.

Appellant relies on *United States v. Fenwick*, supra, and *Bryan v. United States*, supra. This Court has had occasion recently to consider these cases in *Remmer v. United States*, supra, and *Davena v. United States*, supra, with the following observation in the *Remmer* case:

“This Court, in *Davena v. United States*, questioned the ‘vitality of the *Fenwick* case, and the majority opinion in the *Bryan* case was accompanied by a strong dissent. Although these decisions may well have been appropriate because of the particular facts there involved, we believe the general language of the opinion too narrowly limited the function of the jury as the triers of fact.’ ”

Moreover, the Court of Appeals for the Seventh Circuit in *United States v. Yeoman-Henderson* (1952), 193 F.2d 867, 869 restricted its general statements in *Fenwick* to the facts of that case and the Court of Appeals for the Fifth Circuit in *Pollock v. United States* (1953), 202 F.2d 281, 284 encountered no difficulty in distinguishing *Bryan* on the same basis.

Of course, the expenditures in excess of reported income for the earlier years was admissible not only to connect the starting point cash or asset position of appellant to the first indictment year, 1947, but

also as a course of fraudulent conduct to establish fraudulent intent as an element of the crime charged. *Mitchell v. United States* (C.A. 9, 1954), 213 F.2d 951, 956, and cases cited therein.

Nor is there any merit in appellant's contention that the Government failed to prove his ending net worth. Given a firmly established starting point, and uncontested subsequent expenditures in excess of funds available, it is obvious that the ending net worth is merely the sum of the various accumulations. If, perchance, appellant had additional funds on hand at the end of 1948, or undiscovered assets, the result of the failure to prove such items is clearly favorable to him. He could not have had less than shown by the Government, and to the extent that he had more, his unreported income was even greater than the amount shown. And in any event, the Government need not prove the amount of his understatement to a mathematical certainty, but need only show that he owed more tax than he paid. The amount of the tax is not the gist of the offense and, as stated in *Cooper v. United States* (C.A. 8, 1925), 9 F.2d 216, 224 "It was necessary only that it should appear that *some* amount was due, and that the returns were knowingly false and fraudulent in that respect." (Italics supplied.) *United States v. Schenck* (C.A. 2d 1942), 126 F.2d 702.

II. AMPLE SOURCE OF FUNDS WAS SHOWN.

Assuming, *arguendo*, that evidence of a source of income is essential to the proof of a tax evasion prosecution, that requirement has been amply met in this case. There was evidence, denied by appellant, that he was the owner of an establishment where bets were taken on horse races (R. 361, 374-375). He frequented the establishment weekly (R. 850-852); shared the safe for years with Mr. Girard (R. 804); and he testified in the proceedings on a claim against Girard's estate that he bet with Girard (R. 453, 852). He bet \$15,000 with Girard on a horse race in 1947 or 1948 (R. 358-360). He did personal betting on horses both on and off the track (R. 800). He admitted a small bet of \$1,000 on "The Man", a horse which raced in 1948, but denied having lost \$125,000 on the race (R. 800). He had bet on other horses owned by Beasley and had won (R. 802). Except for the year 1945, no gambling gains of any nature were reported on his tax returns.

His own witness, Gedert, testified by deposition that the Detroit Racing Association paid appellant a \$100,000 bonus in 1948 which was not reported. The records of the Detroit Racing Association were destroyed (R. 528).

Appellant was also a partner or investor in various business enterprises (Ex. 62). He failed to report income from Universal Cleaners in 1947 (R. 546). In 1948 he failed to report income from Laurel Potteries Manufacturing Company of \$43,198.44, which amount was reported instead by the other partners

R. 238-244, 549-551). Interest of \$625.36 on a loan made in Laird Medical Building, Inc. in the name of Frank Girard (R. 551-552), and \$6,000 premium on a loan to Alhambra Bowl (R. 553-554) were not reported in 1948.

There was ample evidence of a possible source or sources of income from which appellant's expenditures in excess of his declared available resources could have been made. As stated by this Court in *McFee v. United States* (C.A. 9, 1953), 206 F.2d 872, 874, cert. den. 347 U.S. 927, order denying cert. vacated 347 U.S. 1007, "The law is clear that proof of the exact amount or precise source of unreported income is not required." *Jelaza v. United States* (C.A. 4, 1950), 179 F.2d 202; *Gariepy v. United States* (C.A. 6, 1951), 189 F.2d 459; accord: *United States v. Chapman* (C.A. 7, 1948), 168 F.2d 997, certiorari denied, 335 U.S. 853; *United States v. Johnson* (1943), 319 U.S. 503, 517; *Goe v. Commissioner*, 10 TCM 307, 313-314, aff'd 198 F.2d 851.

III. THE RECORDS WERE NON-EXISTENT.

Appellant asserts, but does not argue, that the Government was required to establish the inadequacy of his records before introducing evidence of the net worth starting point (App. Br. pp. 13-14). He cites no authority for this proposition. However, this Court in *Remmer v. United States* (1953), 205 F.2d 277, judgment vacated on other grounds 347 U.S. 227, stated "The net worth method of computing income

may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income. See 26 U.S.C., Section 41.”⁸ This Court appears to have rejected the same argument in the earlier case of *Chan Shing Ho v. United States* (1951), 186 F.2d 574.

While it is unnecessary in our opinion to reach the question—since, as has been shown (Statement of Facts, Part I, pages 5-8), appellant had no books—in view of the apparent conflict between the *Remmer* and *Chan Shing Ho* cases, we respectfully submit hereinafter our views that Section 41 does not impose a limitation on the use of net worth-expenditures methods of proof of criminal tax evasion prosecutions.

The net worth method is not a method of accounting; its purpose in a criminal case is not to recompute the taxpayer's actual income, in order to determine his exact civil liability in dollars and cents. It is a method of proving, by relevant circumstantial evidence having probative value, that there is a substantial understatement in the taxpayer's reported income

⁸Internal Revenue Code, Section 41 (26 U.S.C. Section 41):

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

and tax.⁹ Even though a taxpayer's method of accounting appears, on the face of his books, to reflect clearly his income, the Government is not precluded from showing that some items of income have not been reported. The net worth method is not a substitute for the cash, accrual, or installment method of accounting. It is simply a means for proving that a taxpayer, whatever his method for keeping books, has failed to show items of taxable income.

Section 41 deals with whether a taxpayer, in view of the character of his business and the nature of his activities and transactions, should be on one or the other basis of accounting or on a calendar or fiscal year basis. Treasury Regulations 118, Section 39.41-2. That is a problem of accounting, the kind of problem involved in cases like *Lucas v. American Code Co.*, 280 U.S. 45; *Dixie Pine Co. v. Commissioner*, 320 U.S. 516, 518-519; *Security Mills Co. v. Commissioner*, 321 U.S. 281. But where a taxpayer either keeps no books, or books which are incomplete, inaccurate, or otherwise unsatisfactory, the Commissioner is authorized to use such means for reconstructing his income (including the net worth method) as may establish the correct amount. Treasury Regulations, 118, Section 39.41-1; *Halle v. Commissioner* (C.A. 2), 175 F.2d 500, 502-503; *Harris v. Commis-*

⁹"While the government had the burden of proof, it was not required to make a perfect case or to prove the defendant guilty to a mathematical certainty. The government did not have to establish the exact amount of unreported income of the defendant. *United States v. Johnson*, 319 U.S. 503, 517." *Schuermann v. United States* (C.A. 8, 1949), 174 F.2d 397, 399, certiorari denied, 338 U.S. 831.

sioner (C.A. 4), 174 F.2d 70, 72-73; *Cohen v. Commissioner* (C.A. 10), 176 F.2d 394, 397; *Richards v. Commissioner* (C.A. 5), 111 F.2d 374, 375; *Bishoff v. Commissioner* (C.A. 3), 27 F.2d 91, 93. The computation of income by examining increases in net worth involves no change of method of accounting from that employed by taxpayer. It is not his method or basis of accounting, but the income not accounted for and reported which forms the basis of this prosecution.

A solidly based net worth computation may provide sufficient evidence in itself that the taxpayer's method of keeping his books does not clearly reflect his income. For if the Government establishes both the totality of the taxpayer's assets at the starting point, and excessive expenditures or increases in his net worth, by evidence which, if believed, would leave no room for a reasonable doubt, the only reasonable inference must be that his books do not properly reflect all of his transactions. *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 189; *Del Marcelle v. Kuhl*, 80 F. Supp. 616, 618 (E.D. Wis.).

Section 41 cannot be construed, therefore, to require the Government to prove the inadequacy of a defendant's *method* of accounting before it may proceed to prove its case by circumstantial evidence. There is no such rule in criminal law,¹⁰ and neither the lan-

¹⁰Truth may be established just as solidly by circumstantial evidence as by direct. In each case the determination depends, not upon the type of the evidence, but by its convincing quality.

guage of Section 41 nor anything that we have been able to find in its legislative history indicates a Congressional intent to make it applicable to criminal cases. It should be noted that the statute refers to computations made by the Commissioner. But the Commissioner is not a party to a criminal case. Civil tax cases are disputes between the taxpayer and the Commissioner, the question is the *exact* amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's computation is erroneous. In criminal cases, however, the issue is whether the taxpayer fraudulently attempted to evade *some* of his income taxes, and the burden of proof is on the Government. The Government must prove, by competent evidence and beyond a reasonable doubt, that the defendant has violated Section 145(b) of the Internal Revenue Code, *supra*, which punishes "any person who willfully attempts in any manner to evade or defeat" tax liability.

The breadth of this provision has frequently been noted by the Supreme Court. *Spies v. United States*, 317 U.S. 492, 499; *United States v. Johnson* (1943), 319 U.S. 503, 517; *United States v. Beacon Brass Co.*, 344 U.S. 43, 45-46. The choice of methods of proof rests with the Government; and Section 41 has reference, not to methods of proof in criminal cases, but to the various recognized basic "methods of account-

United States v. Becker (C.A. 2), 62 F.2d 1007; *McCoy v. United States* (C.A. 9), 169 F.2d 776, 784-786, certiorari denied, 335 U.S. 898; I and IX *Wigmore, Evidence*, Secs. 25-26, 2497; II *Wharton, Criminal Evidence* (11th ed. 1935), Sec. 926.

ing", e.g. cash, accrual, or installment, used in computing civil tax liability. See *Healy v. Commissioner* 345 U.S. 278, 281. Section 41 simply gives the Commissioner authority to change the taxpayer's method of accounting, where it does not clearly reflect the income, from one basis to another. It does not deal with a situation like this where the taxpayer has wilfully concealed items of taxable income.

If appellant's objection goes to the *order* of proof it is equally without merit for it has long been established that the order in which evidence is received is within the sound discretion of the trial Court, and the ultimate collocation of all the evidence for the jury. *Chadwick v. United States* (C.A. 6, 1905), 14 F. 225, 241; *Hoepfel v. United States* (C.A. D.C. 1936), 85 F. 2d 237, 242. The Government is not required to refute all possible speculation as to the sources of funds from which the expenditures might have been made. *McFee v. United States* (C.A. 9, 1953), 206 F.2d 872, 874, cert. den. 347 U.S. 927, order denying cert. vacated 347 U.S. 1007; *Gariepy v. United States* (C.A. 6, 1951), 189 F.2d 459, and it went far beyond its reasonable obligation in that respect.

CONCLUSION.

Appellant was properly convicted on evidence legally admissible and amply sufficient to support

the verdict. The judgment of conviction should be affirmed.

Dated, San Francisco, California,

December 10, 1954.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

JOHN LOCKLEY,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14,450

United States Court of Appeals
For the Ninth Circuit

GEORGE W. LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

JAMES E. BURNS,

HENRY W. HOWARD,

111 Sutter Street, San Francisco 4, California.

Attorneys for Appellant.

FILED

JAN 4 1955

**PAUL P. O'BRIEN,
CLERK**

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No. 14,450

United States Court of Appeals For the Ninth Circuit

GEORGE W. LEWIS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

INTRODUCTION.

The brief of appellee is singular in its omissions. It omits in its statement of the case what the entire record reveals as to the defendant's cooperation with the investigative officers in the furnishing of documents and records, including checks; it fails to point out where in the record there is firmly established for either of the prosecution years a starting point for its so called "net worth" method of proving tax evasion for those years; and finally it declines to discuss where in the record intent or wilfulness are shown by the admitted omission of certain items of income.

In short, the prosecution repeats here what it successfully accomplished in the trial Court. It assails

the reader with an array of figures showing expenditures in excess of reported income over an eight year period and asserts that such a showing is sufficient to sustain a conviction of tax evasion during the last two years.

In an effort to clarify the issues before this Court an attempt will be made to present an orderly reply to the Government's brief but the discussion will not follow the order followed there. Discussion will be directed first to those portions of the record which were not cited by the Government pertaining to the alleged failure of the defendant to cooperate with the agents and likewise those portions dealing with sources of income for the two years in question that were recorded but allegedly not reported.

Finally an analysis of the recent decisions of the Supreme Court concerning so called "net worth" prosecutions will be made to show that under the rules formulated there this conviction must be reversed.

1. WHAT THE RECORD SHOWS.

The Government states that the defendant refused to turn over his checks (R. 854) to the investigating agent. It fails to point out that such was done on the advice of his then counsel. Likewise it fails to point out that the record (R. 930-935) devotes five pages to answers given by the defendant concerning the only checks in which the Government was interested and none of such answers were false. The Gov-

ernment's brief refers to fragmentary portions of the testimony of its own witness William Anater who prepared the three returns that were the subject matter of this indictment. A reading of his entire testimony shows that records were furnished him by the various enterprises in which the defendant had investments and that such records contained full and adequate information from which to prepare the returns. (R. 299.)

The books and records of the various enterprises were subpoenaed by the Government and they failed to establish that there were false or fictitious entries contained therein, any attempt at concealment, or that there was any income from such enterprises not recorded properly.

Appellee implies that defendant concealed a partnership interest in the Universal Cleaners. The implication is improper. The prosecution witness John Bascon testified as to the nature of the transaction. (R. 137-141.) On cross-examination he clearly stated that the defendant was not a partner in the enterprise and that he, the witness, paid the income tax on whatever taxable income had been received.

The Government's brief refers to the failure of the defendant to report a so called partnership profit of \$43,198.44 from the Laurel Pottery Manufacturing Company for the year 1948. The Government's witness Anater testified on direct examination that he was the one that decided the item should not be reported by the defendant (R. 238-242) but rather that

it should be included in the income of the other partners who received the income; and he testified further that the other partners reported the income and paid taxes on it. (R. 301, 304.) Furthermore, as the record plainly reveals, the entire sum is clearly reflected in the books of account of the partnership and in its income tax return for the year in question. It is thereby inconceivable that a difference of opinion between the Government and a qualified accountant as to whom the income in question for technical reasons should be credited, could be made the basis of a criminal charge of evasion.

A reading of the record will reveal that the Government's reference to an undisclosed and unreported \$100,000.00 bonus in 1948 is lacking in merit. The deposition of John J. Gedert was read to the jury. (R. 580.) The original was filed with the clerk and has been transmitted to this Court as an exhibit. It was then disclosed that the witness Gedert had changed his testimony at the time the official reporter brought the deposition to him for reading, correction and signature. The witness at the time of his deposition stated that appellant in 1948 had received a salary of \$50,000.00 and a bonus of \$50,000.00 from the Detroit Racing Association. At the time the corrections were made, he doubled each of these figures. These changes were made in such a manner as not to be evident on the face of the deposition and were made in the absence of counsel. (R. 873-875; 890-894.) But the records of the Detroit Racing Associa-

tion and a firm of accountants were introduced into evidence and clearly showed the exact amount of salary and bonus received by the defendant in 1948 and that such amount was actually and accurately reported by him. The Government never disputed the accuracy of these records at any time prior to the filing of its brief on appeal.

2. RECORD INSUFFICIENT TO SUSTAIN THE CONVICTION.

Since the opening brief was filed herein the Supreme Court has handed down decisions in four of the cases cited in that brief which were then under consideration. They are:

Holland v. United States, 75 S.Ct. 127;
Friedberg v. United States, 75 S.Ct. 138;
United States v. Calderon, 75 S.Ct. 186;
Smith v. United States, 75 S.Ct. 194.

Appellee's brief in a footnote (pp. 21, 22) refers to these cases and states the Government's contentions were upheld by the Supreme Court in each of them. As a general statement that might be accurate. However an analysis of the decisions not only supports the conclusion that the safeguards and standards which the Court announced should be applied by trial and appellate Courts in prosecutions of this kind are not to be found in the record of the instant case, but also reveals that in one case (the *Calderon*) the use of the net worth method was in fact rejected.

In the first of these cases, *Holland v. United States*, 75 S.Ct. 127, Justice Clark writing the opinion of the Court expressed its concern over the increasing tendency of the Government to rely upon net worth methods of proof in prosecutions for income tax evasions. Pointing out that its widespread use indicated that the Government deemed it useful in the enforcement of the criminal sanctions of the tax laws, he stated:

“Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use.”

He went on to point out that reviewing Courts had become disturbed by the use of this method of proof particularly in its scope and the latitude which it allows prosecutors. The evolution of the system of proof was commented upon and the cases of *Capone v. United States*, 51 F. (2d) 609, and *Guzik v. United States*, 54 F. (2d) 618, were cited where the method was used to corroborate direct proof of specific unreported income. Likewise it was stated:

“In each of the four cases decided today the allegedly unreported income comes from *the same disclosed sources as produced the taxpayers reported income* * * *.” (Emphasis added.)

This factor alone distinguishes these cases from the instant case. Here there is no creditable evidence at all as to a source of income in the prosecution years which could conceivably account for the income which the Government alleges was unreported. Certainly the testimony of these witnesses Beezley and

Gaskill, neither of which pointed to a profit and both of whom were unable to identify the exact year in which the events they related occurred, can be viewed seriously—most certainly their testimony cannot found a criminal charge of tax evasion.

The opinion then points out six difficulties involved in using the net worth method, including the difficulty in convincing the jury of the existence of substantial amounts of cash not considered in the net worth computation; the confusion and conviction based on bare figures alone computed by the Government; the tendency to shift the burden of proof; the unreliability of the defendant's statement made in the course of an income tax investigation prompted by the hope of a quick settlement; and finally the difficulty of allocating to the respective indictment years the alleged deficiency and the possibility of a taxpayer being convicted on counts of which he is innocent.

The Court stated:

“While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. * * * Trial Courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. * * * Appellate Courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.”

The opinion then reviewed the facts produced by the Government in support of the allegations of the indictment. The Government established an opening net worth computation at the beginning of the indictment period. It should be pointed out that in the instant case the Government *did not establish or attempt to establish* an opening net worth at the beginning of the indictment period.

The Court pointed out the necessity of establishing with reasonable certainty an opening net worth and stated:

“The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.”

The Court then examined the contention of the defendants that the opening net worth figure was inaccurate because it failed to take into consideration cash saved over a long period. It examined the Government's negation of this contention by proving a long period of economic adversity and hardship including the necessity of the wife's employment for a considerable period prior to the indictment years. It then stated:

“Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.”

Applying this rule the Court reviewed the evidence which showed that although the hotel business which

the defendants operated increased each year in question the reported profits fell to approximately one-quarter of the amount declared by the previous management in a comparable period; that cash register tapes had been destroyed and that the increase in net worth for one year was accounted for by unreported hotel income.

The Court held this evidence sufficient to negate any explanations of the defendant as to the possible sources of such increases. The Court stated (emphasis supplied):

“Increases in net worth, *standing alone*, cannot be assumed to be attributable to currently taxable income. *But proof of a likely source*, from which the jury could reasonably find that the net worth increases sprang, is sufficient.”

The Court pointed out that the disclosed business of the defendants was proven to be capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases.

In the instant case the record is devoid of any proof of a disclosed or undisclosed source of income sufficient to account for the expenditures made by the defendant. Their only origin was the cash accumulated in prior non-indictment years. That this was the only origin is manifest from the record in this case. That the accumulation of cash was in existence long prior to the indictment years was made known to the Government by the defendant. (R. 721-724.) Thus under the pronouncement of the Supreme Court

in the *Holland* case (supra) the failure of the Government to examine this lead should have been ruled as a fatal flaw of this prosecution.

Outlining the pitfalls encountered by the innocent who are prosecuted by the use of the net worth theory the Court had this to say:

“While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses—should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer’s innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government’s case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused’s being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Govern-

ment. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

The record here shows that in the early 1940s the defendant was interviewed by agents of the Internal Revenue Bureau who were investigating his financial condition. He told the agent:

"Well, if you want to find out how much I've got, there's the suitcase under the table. Go in and count it." (R. 723.)

At the time the defendant stated he had a million dollars in currency in the suitcase. That this is a probable fact is gathered from a reading of all the record which reveals that from the year 1906 until the middle thirties the defendant was in the book-making business. His stock in trade or inventory was currency. It could be said of him that all of his money was tied up in cash.

The evidence as to his interview by agent O'Connell was uncontradicted. It is assumed that if such testimony was false the Government could quite easily have produced its own agent, Mr. O'Connell, as a rebuttal witness, but this was not done. This constituted evidence of a lead which the taxpayer had furnished the Government—a lead reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. It was the type of lead, which, if not checked and found untrue, the Supreme Court says, must be taken as true—and the trial Court holds as a matter of law that the evidence, based solely

on the approximations and circumstantial inferences of a new worth computation, is insufficient.

Holland v. United States, 75 S.Ct. 127.

There was no evidence in this record that the defendant was ever in economic want or his financial position throughout the years precluded his amassing the fortune he claimed. The record supports such a claim. The deposition of John J. Gedert already referred to shows that he was lending large sums of money, currency, to the money room at the Detroit racing track in the middle thirties. The testimony of Gene Normile (R. 581-605) shows that the defendant in the late twenties was possessed of large amounts of cash and that he booked "come back" money at Tia Juana to the extent of \$150,000.00 a day. (R. 585.)

Thus the record presented here is far different from the one in the *Holland* case or in *Friedberg v. United States*, 75 S.Ct. 138, where the claims to large amounts of cash was overcome by a history of privation and economic hardship suffered by the taxpayers during the time they claimed to have made the accumulation.

The Government in its attempt to overcome the facts rely solely on the uncorroborated extrajudicial statements of the defendant as to his financial status in 1941. (Exs. 14F, 58.) The circumstances under which such statements were given was explained by the defendant; that he made them in order to settle tax claims he felt were unfair, unfounded and arbitrary. Justice Clark's words with regards to such statements in the case of *Holland v. United States*, 75 S.Ct. 127, are appropriate. There he stated:

“But when a Revenue Agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than and honest search for the truth.”

The Government in its brief states that it is not required to set a net worth at the start of the indictment period. They assert that fixing it at any time prior is sufficient because it is a mere mathematical calculation to move it forward. No cases are cited in support of this assertion. It is true that the past financial history of the taxpayer may be scrutinized but in every case examined a fixed net worth was established for the beginning of the first indictment year.

The Supreme Court in the case of *United States v. Calderon*, 75 S.Ct. 186, rejects the contention of the Government in this regard and held that resort to the net worth method of proof was not valid where the uncorroborated statements of the defendant and a sketchy financial background was all the evidence offered.

Here the Government relied solely on the 1941 uncorroborated statements of the defendant at a time when he was seeking a settlement of disputed tax deficiencies. It is obvious that if this figure is unreliable a mathematical computation based thereon is likewise unreliable.

It was stated in the case of *Holland v. United States*, 75 S.Ct. 127, where the starting net worth figure was the first prosecution year:

“We agree with petitioner that an essential condition in cases of this type is the establishment,

with reasonable certainty, of an opening net worth to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

That all assets on hand were not computed is demonstrated by the Government's own Exhibit 62 (Appendix) and its stipulations concerning the cash transactions of the defendant within the first sixteen days of January, 1947. (See Appellant's Opening Brief, pp. 15-17.) As a consequence a proper starting point was not fixed within the standards laid down by the decisions herein cited.

CONCLUSION.

A reading of the latest pronouncements by the Supreme Court in the four cases herein cited show that the safeguards and standards of proof which the Court states must be maintained by trial and Appellate Courts in these prosecutions are lacking in this record.

The Government is no longer permitted to amass an array of figures and calculations based on uncorroborated statements of the taxpayer made many years prior and then place the burden of proving innocence upon the defendant. The Government is required to show a likely source of income and not permit the jury to engage in tenuous speculation concerning some

possible source. Nor can the Government overlook or withhold leads furnished it by the taxpayer and reasonably capable of examination as to their truth and then be heard to say that its evidence is sufficient when it is based entirely on approximations and calculations not related to the facts.

It is submitted that in keeping with the language of the Supreme Court this Court should review this entire record and reverse this conviction because it was not obtained by application of the principles pronounced in those cases. If this Court is required to scrutinize with care convictions obtained through the net worth method of proof, certainly a conviction obtained by what is termed by the Government to be an "outgrowth" of that method requires careful consideration, especially where as here defendant was required to prove his innocence not only of written but also unwritten charges of tax evasion.

Dated, San Francisco, California,
January 3, 1954.

Respectfully submitted,

JAMES E. BURNS,

HENRY W. HOWARD,

Attorneys for Appellant.

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